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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 4—ORIGINAL.

STATE OF NORTH CAROLINA,
COMPLAINANT,

vs.

STATE OF TENNESSEE,
DEFENDANT.

IN EQUITY.

**Abstract and Analysis of Evidence in the Record Prepared
by the State of North Carolina.**

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Attorney General of North Carolina.

THEO. F. DAVIDSON,
C. B. MATTHEWS,
Of Counsel.

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Abstract and analysis of evidence
in the record prepared by the state
of North Carolina.

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Abstract and Analysis of Evidence in the Record Prepared by the State of North Carolina.

The complainant offered in evidence the Act of 1819 of the North Carolina Assembly and the Act of 1820 of the State of Tennessee (Record, 81, 82, 83), out of which act grew the appointment of the joint commission who ran the State line at the disputed points in 1821.

The first Act, Section 2, provides as follows.

“And this State will at all times ratify and confirm all and whatsoever the said Commissioners, or a majority of those of each State shall do in and touching the premises binding on this State.”

The Tennessee Act, Section 3, provides that:

“Whatsoever the said Commissioners; or a majority of those of each State shall do in and touching the premises, shall be binding on this State.”

So that it was apparently present in the minds of the respective legislatures that nothing in the Cession Act, nor in the Acts providing for the appointment of these commissioners, was definite enough to make the action of the Commissioners merely ministerial and that there was some discretion and room for difference of opinion with reference to the duties which they would be called upon to perform.

The report of the Commissioners of 1821 (Record, 83) was next introduced, and it is advisable to draw the attention of the Court to portions of the language in that report. They recite that:

“Having met at the Town of Newport in the State of Tennessee, on the 16th day of July, 1821, to settle, run and mark the dividing line between the States from the termination of the line run by McDowell, Vance & Matthews, in the year of our Lord, 1799, to the southern boundary of the said States, respectfully report that we proceeded to ascertain, run and mark the said dividing line as designated in the 11th article called The Declaration of Rights of the Constitution of the State of Tennessee and in the Act of the General Assembly of the State of North Carolina, entitled ‘An Act for the purpose of ceding to the United States of America certain western lands thereon described,’ passed in 1789.”

In reference to crossing the Tennessee River this language is used:

“And crossing the Tennessee River at sixty-five miles from the beginning. From the Tennessee River to the main ridge and along the extreme height of the same where it is called Unicoy or Unaka Mountain, striking the old trading path leading from the Valley Towns to the Over-Hill Towns, near the head of the west fork of the Tellico River and at the distance of ninety-three miles from the beginning. Thence along the extreme height of the Unicoy or Unaka Mountain to the Southwest end thereof at the Unicoy or Unaka Turnpike Road where a corner-stone is set up marked ‘Ten,’ on the west side and ‘N. C.,’ on the East side,

where a hickory is also marked on the south side 'Ten. 101m.', and on the north side 'N. C. 101m.', being 101 miles from our beginning," etc.

And further,

"The said dividing line run by us in its whole length is distinctly marked with two chops and a blaze on each fore and aft tree, and three chops on each side line tree, and mile marked at the end of each mile; agreeably to the plats which accompany this report, and which said plats and reports are certified by us in duplicate, one for each of said States," etc.

On page 86 there is an admission by the respective parties that upon search of the public office of the Capitol in Raleigh, thoroughly made by the proper officials, no original or copy of the plat and survey of the Commissioners, or the field notes of the same, could be found.

The complainant next introduced the Acts of North Carolina and Tennessee confirming the said report and survey (Record, 86, 87). In the North Carolina Act, in Section 1, these words are used:

"The whole distinctly marked with two chops and a blaze on each fore and aft tree and three chops on each side line tree, and mile marked at the end of each mile."

Next is introduced a plat of a partion of the Ocoee Land District, situated in the State of Tennessee and including Monroe County, and in fact extending to the Georgia State line, which was made in pursuance of an Act of the General Assembly of the State of Tennessee, authorizing and directing the Surveyor General of that land district to plat the district, in which it is shown at the point in dispute and immediately southwest of the Tennessee River that the Surveyor General ended his survey at Slick Rock Creek, and in making his sections, made fractional sections along that creek.

In 1852 (Record, 89) an entry-taker's office was established by the State of North Carolina, in the county of Cherokee, which, up to 1872, included the lands constituting the present

county of Graham, through a portion of which the Slick Rock Creek runs.

Thereupon, taking the complainant's evidence in regular order there were introduced, commencing Record, 89, a large number of entries beginning with the 12th of March, 1853, and surveys and field notes of one J. W. C. Piercey, who was County Surveyor of Cherokee County at that period, and afterwards in connection with these entries and grants, a certain plat of entry No. 1035, a portion of which was in dispute in what was known as the case of *Hebard v. Belding*. These entries, surveys and grants are numerous and relate to the lands along Slick Rock Creek and also on the waters of the Tellico River constituting the two disputed portions of the State line, and take up that portion of the record from page 89 to 154. With reference to this, while it is true that it does not settle the matter for want of contending parties to make claims as to the location of the State line, yet it does show that as far back as the inception of the dealing with these lands by the State of North Carolina, it was understood evidently from common report and probably from knowledge that the State line was located as is claimed by the State of North Carolina, to wit: up the Slick Rock Creek and thence up to the Big Fodderstack, and from there to the junction, and below crossing the Tellico River and not going around its head. When we add to this the facts that the entries and grants of the lands in the neighborhood of Slick Rock Creek and in Monroe County, Tennessee, while they do not in express terms mention the Slick Rock Creek as the Eastern boundary line, do make the conveyances in grants with the fractional sections of the plat of the Ocoee Land District, and when we further consider the plat itself, which was an official document agreeing with the evidence, whatever its strength may be, with the North Carolina entries, surveys and grants, the evidence becomes cogent with reference to the location of the State line.

Judge Clark, in the case of *Hebard v. Belding*, heretofore mentioned, and in his opinion confirming the master's report in that case, says that a different question would arise if the State of Tennessee could be estopped. In that case the evi-

dence was not introduced for the purpose of creating an estoppel. The reason why the State could not be estopped is that it is sovereign and can not be sued without its own consent, but if it should consent to be sued, we take it that the ordinary rule governing the ascertainment of rights would prevail as in the case of individuals.

In this case, where the Constitution of the United States gives this Court jurisdiction original in its nature, a state may be estopped. But, be that as it may, the evidence of the concurrent acts of the two states in reference to the location of the line, if it points to the same location, would be strong.

OCOEE LAND DISTRICT SURVEY.

The State of Tennessee caused the Ocoee Land District to be surveyed about 1836, only fifteen years after the line was located in 1821, and at a time when presumably many, if not all, of the persons concerned in that location were alive and when presumably the report, map and field notes were in existence and accessible, and therefore with this strong correspondence of the authorities of both States and concurrent action thereon, the presumption would be almost irresistible that it was known at that time, especially to the authorities of Tennessee, that the Slick Rock Creek for a certain distance was the dividing line.

PHILLIPS' TESTIMONY.

The complainant then introduced sundry witnesses, who testified as to the tradition from a time long since elapsed (commencing Record, page 155). The first witness in that line of testimony was N. G. Phillips, a resident of North Carolina, seventy-nine years of age. He testified that Graham County was cut off from Cherokee County in 1872, and that he was well acquainted with one Thomas C. Tatham, who at that time had been dead for about forty years; that in about 1852, or 1853, in the presence of one Captain Steve Whitaker, Tatham talked about the State line between North Carolina and Tennessee, and stated that he was with the Commissioners who ran the line; Whitaker was desirous of

entering some land and it was important to him to know where that State line was located. Tatham stated in that interview that the line ran up Slick Rock Creek for about four miles and then ran up a ridge between two prongs of the Creek, and that the Commissioners had come down to the river and could not get across the river and located a big spruce pine tree at the mouth of Slick Rock Creek, and that after going up the spur they reached Fodderstack. He also states that Piercey, the County Surveyor, was told the same thing by Tatham, at a time when he, the witness, was present. He also testifies that he heard Steve Whitaker, a prominent man in that section and at one time a member of the Legislature, state the same thing, and in 1853 or 1854, heard one Doctor Patten say the same thing, and that the general reputation was that Slick Rock Creek was the dividing line and that no other talk was commenced until about 1892, or fifteen years ago as he expressed it. That when Graham County was laid off from Cherokee, he, the witness, ran the line for the County Commissioners, and treated Slick Rock Creek and the ridge up to Fodderstack as the line, and that he, in 1874 or 1875, divided the county into townships, running to that creek, and that Graham County always exercised jurisdiction over the territory up to that creek.

JENKINS' TESTIMONY.

Next, William Jenkins, who stated that he was seventy years old, and lived in Murphy, North Carolina; that when a young man he knew one Foster, who was then thirty-five or forty years of age, and who is since dead, and that Foster told him that he was with the party that ran the line and described it as in the same locality, and furthermore, that below they went along the State Ridge and crossed the Tellico River. He then continues that on that line as located that he had seen the State line marks, both fore and aft and side line marks, and that he had seen (Record, 167) the spruce pine about twenty yards from the mouth of the creek, and that he was there as far back as 1859, and that these marks were old marks when he saw them.

The evidence that this witness saw the pine tree at the mouth of Slick Rock Creek is very important, because in the recent survey it was evident that that tree had been destroyed by a storm and could not be identified unless a tree which was lying upon the ground was the one.

DAVID A. HYDE'S TESTIMONY.

David A. Hyde (Record, 169), who states that he is seventy-five years of age, living in Graham County, North Carolina, says that he knew J. W. C. Piercey, who was for quite a while surveyor of Cherokee County, North Carolina, and that he also knew Thomas Tatham and was present at a talk between Piercey and Tatham. This talk was about the State line between Tennessee and North Carolina. Piercey was inquiring about the State line and Tatham said it commenced at Slick Rock Creek and ran up the creek with the main divides of the mountain and ran thence to the main top of Fodderstack, and that Tatham said that he was with the Commissioners who ran the line in 1821 and they gave the name of Big Fodderstack to that range. This conversation was in 1855.

N. F. COOPER'S TESTIMONY.

N. F. Cooper, also a resident of Graham County, North Carolina, since 1838, and at the time of the taking of this deposition was eighty-two years of age, says that in 1853 or 1854 he was in Murphy, Graham County, and had a conversation with Doctor J. W. Patten, Dr. J. M. Lyle, and an old gentleman by the name of J. J. Turnbill. That in the conversation with them it appeared that Dr. Lyle had made an entry there and Piercey had surveyed it; that these men were all dead, and they stated that the line crossed the Tennessee River at the mouth of Slick Rock Creek, and that they found a tree there, a fore and aft tree, and that Piercey always told him the same.

ROPETWISTER'S TESTIMONY.

Ropetwister, a Cherokee Indian, who said he was seventy-eight years of age (Record, 174), but W. P. Taylor, who had

lived in Cherokee County, North Carolina, but was then living in Oklahoma, eighty-three years of age, says (Record, 189) that he saw Ropetwister in 1835 and that he was then a big, stout Indian and a fine ball player. Ropetwister says that Cheowah River was known by that name when he was a boy, and that he also knew Slick Rock Creek, and that his father told him a number of times that the State line crossed the Tennessee River at the mouth of Slick Rock Creek, and that he said that the Commissioners went on to the Smoky Mountain and went to a thicket, which they could not get through. They hung up a flag there and as they went on they set up a rock about three feet high on the side of a trail in the direction of Ball Play. He said after coming to the thicket they could not get through, and they came back to the mouth of Slick Rock Creek and went on the line towards Georgia. That a man by the name of Organder had pulled this rock up. That the line ran along with the Creek and that the line was marked.

WM. WILLIAMS' TESTIMONY.

William Williams, who lived in Monroe County, Tennessee, and who well knew the Slick Rock territory and was seventy-seven years old, says that his father who died in '55 or '56, told him that the line ran up Slick Rock Creek to the forks of the creek and then up to Big Stack (Record, 178), which he says below is Big Fodder Stack, and from there on to Unaka and that the line was never in dispute until about fifteen years ago, and that Bill Deputy, who is a witness for the defendant, went across the creek to evade the officers of the law who came after him. He told them he was in North Carolina and they went back. That standing on Smoky Mountain and looking across the Tennessee River, Big Fodder Stack is the main lead. That he had heard Joseph Milligan, Harve Bright, John Bright, Mike Harrison, and William Harrison and all of the old people who lived in that neighborhood who are now dead, but were citizens of Tennessee, say it was on Slick Rock Creek. That he knew what was called Tellasse Old Trail, which crossed

Slick Rock Creek. At Record, page 181, he said that in the '50's a copper fever broke out in that country, which extended to the North Carolina side, and that entries were made in that territory, or options taken to work for copper.

He also says he heard Levi Mashburn and Clinton Hudson, old people who were then dead, say that Slick Rock Creek was the line, and that people who were evading the law of Tennessee just went across the creek, and he says that he himself did it.

JAMES WILLIAMS' TESTIMONY.

James Williams (Record, 184), eighty-five years of age, living in McMinn County, Tennessee, heard his father, who was then dead, often speak of Slick Rock Creek as the line and that it went up Slick Rock Creek to the Stack, and that everybody said that until the last few years and it was never denied until a few years ago; that his father lived in Tennessee, but went just over the Creek and located lands in North Carolina. On page 186, that his father told him that the line went up Slick Rock Creek and took the ridge to Big Fodderstack.

W. P. TAYLOR'S TESTIMONY.

W. P. Taylor, eighty-three years of age (Record, 186), who had lived in Cherokee County, North Carolina, says that he knew Thomas C. Tatham well and that Tatham died in the 50's. That in '49 or '50 in his presence Tatham told Morris that he was with the Commissioners who located the line, and that it went up Slick Rock Creek. (This was Gideon F. Morris.) That Tatham said it ran off the Smoky Mountain down opposite the mouth of Slick Rock Creek. He said they had to go down the river to ford it; that they forded it at the first ford and that they came back up the river to the mouth of Slick Rock Creek over the old trail to the mouth of Slick Rock Creek, and then went up the creek to a ridge and then to the Big Fodder Stack. That he claimed that to be the line and that one Andy Colvard in the fifties said the same thing. Colvard long since dead. Also old man

Upton, who lived in Madisonville, Tennessee, and the two Harrissons, Mike Harrison and Bill Harrison, said the same back in 1876, and that he had never heard that line doubted until he heard of this dispute; that the general reputation located the line on Slick Rock Creek. He also heard James Taylor, his brother who is dead, and Piercey say the same thing.

V. E. GRANT'S TESTIMONY.

V. E. Grant, who lived in Monroe County, Tennessee, fifty-two years of age (record, 191), says that he had heard old men talk about where the line runs and that he knew where it was located by reputation. That everybody said it was on Slick Rock Creek and then up the spur to Fodder Stack and that twenty-five or twenty-six years ago he heard Jake Shope, an old man, and Frank Schuler, both of whom are dead, say that same thing and while in Tennessee there was some little differences of opinion, all the old men in Tennessee said the line was up Slick Rock Creek. Among others, Mike Harrison, who died fourteen or fifteen years ago, told him the line was on Slick Rock Creek and ran five miles up that creek to the lead that goes to Big Fodder Stack. That Jack Milligan, who is also dead, said the same thing. Also Jason Culberson, who died twelve years ago, eighty-six years of age, fixed the line on Slick Rock Creek, and the witness's father in law, who is seventy-seven or seventy-eight years, still living at the time he gave his testimony, said the same thing.

On page 194, he mentions Boyd McMurray having disputed it. This witness says that Hangover is hardly a ridge; that it is broken up by gaps. On page 196, he states that when any of his cattle got over Slick Rock Creek that he was notified and had to get them and bring them back, and that Deputy claimed to live in North Carolina.

E. W. HARRISON'S TESTIMONY.

E. W. Harrison, a resident of Monroe County, Tennessee, was raised six miles from Slick Rock Creek (record, 196), a son of Mike Harrison; that he, in 1868, heard his father say the line ran up Slick Rock Creek four or six miles and

then up the ridge to Fodder Stack. That his father has been dead fourteen years. That the general reputation located the line on Slick Rock Creek. That he had heard Colonel Milligan and Jack Milligan say that in 1868, and Elbert DeLashmet say the same and that the witness had several uncles who said the line was there; John Harrison, William Harrison and Bob Belew. That his people had entered some land there. They sent John Harrison to one Tom Calloway, who said he was with the Commissioners and that the line ran up Slick Rock Creek. That these were all Tennessee people and that there was some excitement at that time about the minerals.

O. P. WILLIAMS' TESTIMONY. (Record, 200.)

This witness lives in Swain County, North Carolina. He knew surveyor H. P. Hyde, who was a good surveyor, of good character; who was one of the surveyors who ran the line for the State of North Carolina in 1897 and the witness was with him; that that survey ran from the mouth of Slick Rock Creek twenty-five miles to Beaver Dam Bald, in a southwest course; that it ran five miles up the creek, then up the ridge to Big Fodder Stack between Slick Rock Creek and Citico Creek and then to Laurel Top; thence by the State Ridge to Beaver Dam Bald. That there were marked trees up Slick Rock Creek, some of which were blocked and found to be of seventy-six years growth. That as they went up they found other side line trees. Also found them on the State Ridge and found the eighty-six mile tree. That the marks along this line seemed to have been made with the same instrument and about at the same time.

This witness was once clerk of the Superior Court of Graham County; was in the Legislature of North Carolina, and was at the time of his testimony, and had been for six years, clerk of the Superior Court of Swain County, and said that in making the survey of 1897, they made no new marks.

On page 302, he says that commencing at the Tennessee River, Hangover is in a southerly direction.

JASPER L. FAIN'S TESTIMONY.

Jasper L. Fain (record, 204), who lives in Cherokee County, North Carolina, in the neighborhood of Tellico River territory, about one hundred yards from the line as claimed by North Carolina, says that he has always voted in North Carolina and paid taxes there. That he had known State Ridge by that name for twenty-five years. That it runs southwest and that Laurel Top is about half a mile from County Corners. That he had seen State line trees on the State Ridge all the way to Jenks Ridge and had seen the eighty six mile tree, a holly tree, marked "86 M." That he has searched the line as claimed by Tennessee around the headwaters of Tellico River by McDaniel Bald, but was never able to find any marks. That State Ridge is a main ridge running in a southwesterly direction and continues until cut in two by the river. That the other line claimed by Tennessee runs about five miles due east from County Corners and in getting on to that ridge you would drop down about 410 feet and drop on to a ridge that is up and down, which to the 101-mile tree would be about six and one-half miles further. That he blocked some of the trees on the State Ridge line, and they showed eighty-seven years of growth. On page 212 that the ridge around Tellico River by McDaniel Bald has low gaps and knobs all the way around.

A. A. FAIN'S TESTIMONY.

A. A. Fain (record, 212). This witness at the time of testifying was clerk of the Superior Court of Cherokee County, North Carolina. Speaks of the lands spoken of by the previous witness, and that they paid taxes on those lands in North Carolina and that warrants from the courts of North Carolina were issued and executed by North Carolina.

JOHN DOCKERY'S TESTIMONY.

John Dockery (record, 215), a resident of Cherokee County, North Carolina, seventy-four years of age, who occupied a tract of land in the disputed territory, said that he always paid taxes in North Carolina and had never been asked to

pay any place else, and that he had known what was called State Ridge under that name since he was a boy. That he knew well old Billy Graves and old Bill Allen, who were dead, and who both told him that they were along with the Commissioners when the line was run and helped run it, and that the line ran on State Ridge and that the witness had personally seen along that ridge a good many State line marks and that it was always known as the State line, and on page 217, that it was never disputed until Fain got into his lawsuit.

E. R. HUNDSUCKER'S TESTIMONY.

E. R. Hundsucker, who lived in Cherokee County, North Carolina, states that he had known State Ridge fifty or sixty years and knew William Graves well,—the same Graves who was mentioned by the previous witness, and that Graves told him that he was with the Commissioners who ran the State line and that State Ridge was the line and that it crossed Tellico River. That he had owned a piece of land in the disputed territory, but had always paid taxes and voted in North Carolina and that his children went to school in North Carolina and that there was no dispute about the line in those days.

ISAAC LOVINGOOD'S TESTIMONY.

Isaac Lovingood (record, 221), seventy-seven years of age, says that he knew State Ridge where the said line ran and had known it for fifty-five or sixty years. That one Beaver, who occupied property in the disputed territory always claimed North Carolina as his home and paid taxes in North Carolina.

D. W. DEWEESE'S TESTIMONY.

D. W. DeWeese (record, 222), lives in Murphy, Cherokee County, North Carolina, sixty-four years old, says that he had known Billy Graves well, who said he was with the Commissioners, and Graves pointed the line out to this witness, as being on the State Ridge running southwest and that he had been with Graves along that ridge many times from Tellico

to County Corners, saw the State line marks, three hacks and two hacks and a blaze. That he had known State Ridge by that name since a period of six or eight years before the war, and it was so called, as he understood it, because the State line was on it.

This witness had been the sheriff four or five times, clerk of the Superior Court twice, representative in the Legislature once, besides having held a number of minor positions. He had been mayor of the town and superintendent of the public schools, and says that the Fains and Beavers all paid taxes to him in North Carolina and that Tennessee never claimed taxes there.

DAVID ORR'S TESTIMONY.

David Orr (record, 863), a farmer fifty-seven years of age, living in Graham County, North Carolina, and who lives a short distance east of the land in dispute and has lived there for twenty-three years, says that ever since he has lived in that country he has heard that the State line ran up the Fodder Stack lead, and that it has only been claimed in the last fifteen years that the line ran over Hangover Ridge. He says that he heard Williams and Hoyt say that they ran up and back on the Hangover Ridge and if there was any State line tree on that ridge it was a sourwood, but said that they could not find any State line trees.

J. S. MARONEY'S TESTIMONY.

J. S. Maroney (record, 867), who lived at Murphy, North Carolina for fifty-eight years, says that he knew one Robert Ballou well; that the witness went with an Englishman to examine minerals and went to Ballou's house in Tennessee and he thinks to Harrison's house also, and then that they all went up Slick Rock Creek. This was about the commencement of the war. But after getting to Slick Rock, they went around by Little Fodder Stack Ridge and Big Fodder Stack, and looked at the property, which they pronounced valuable. Harrison, who went with them, was the one who claimed the land. They were citizens of Tennessee but say that the property lay in North Carolina, and as under the North Carolina

Laws they could not enter the lands, they wanted the witness' father or some one else to enter the lands in his name.

SAMUEL HENRY'S TESTIMONY.

Samuel Henry (record, 867), seventy-eight years of age, who had been living in Murphy, North Carolina, for fifty-five years, says that the witness entered some lands on Slick Rock Creek about 1870 for Ballew and somebody else, and the reason was that Ballew as a Tennessean could not enter the lands.

J. W. PATTEN'S TESTIMONY.

Dr. J. W. Patten, who had resided in Murphy, North Carolina since October 30, 1849, and was sixty-nine years of age, said that he knew old man Thomas Tatham, who was one of the party when the Commissioners ran the line in 1821; that he has been dead for twenty years and that the witness also knew William Graves, who was also one of the same party, and that he is also dead; and that they both told him that the Commissioners ran up Slick Rock Creek to the fork of the creek (record, 868), crossed the west fork and struck the point of a ridge that ran down into the fork of the creek, and ran up that ridge to the divide that ran up to Big Fodder Stack and over the Fodder Stack on the main divide to Haw Knob. Thence up the Haw Knob Mountain to Laurel Top and down the Laurel Top to the divide between Snowbird and Tellico, and ran the line some distance and marked it on that divide. That they then saw that they were going too far south and to keep the trend of the mountain, turned and went back and took a ridge from Laurel Top that ran westerly to Tellico River, crossed the river at a short distance from the river marked a holly tree on one side Tenn. and on the other side N. C. and from there on to Beaver Dam Bald and on to Unaka Gap and then turned south and ran to the Hiwassee River and from there to the Georgia line.

On page 869, this gentleman said he became interested by reason of the fact that his father in law had entered two tracts of land in 1854 on the head of Little Slick Rock. In 1867 this had not been paid for, "and he told me that if I would

pay what was due on them he would give them to me," and that was how I came to talk to old man Graves.

In reference to the Slick Rock part, he says he followed the line to near the head of Little Slick Rock and tried to trace it on to the Little Fodder Stack, and could not do it, and then went back and found the marked line leading down the ridge between two forks of Slick Rock Creek. That they went on following the line down the ridge to the foot where the forks of the creek came together at a distance of four or five miles from the Tennessee River. Then they crossed the prongs of Slick Rock and found an old line leading down the creek just outside of the Laurel as near the creek as they could get along and traced it down the creek that way to the creek's mouth and found a large pine tree marked. The marks were not very distinct but we were satisfied that they were old marks. In consequence of that tracing, the witness abandoned making that entry because only a portion of it was east of that line.

JAMES McDANIEL'S TESTIMONY.

James McDaniel (record, 891), seventy-years of age, who lived about four miles from Murphy, North Carolina, and had lived in that neighborhood over sixty years, says that he knew William Allen and William Graves, both of whom were dead. That he lived about two miles from Allen's house and three-quarters of a mile from Graves. That Graves told him that they were along with the Commissioners in 1821 and that the Commissioners had run up the river to Slick Rock Creek to the forks of the creek, then up a ridge between the forks of the creek to the top of the mountain and the main lead and then along the main lead of the mountain.

JOHN DOCKERY'S TESTIMONY.

John Dockery (record, 872), who is sixty-two years of age, and had lived for fifty-two years in Cherokee County, says that he knew both Allen and Graves who were among the Commissioners in 1821. That old man Graves had told him about the line down at Tellico River but nothing about the Slick Rock line; but Allen told him that the line ran up

Slick Rock Creek and that that was the general understanding and reputation. That John Debity told him that the line ran up Slick Rock Creek. That he had never heard any portion of the ridge called Unaka or Unicoy until they got to the Beaver Dam Bald.

M. L. BRITTAIN'S TESTIMONY.

M. L. Brittain (record, 876), then living at Murphy, North Carolina, but from 1851 to 1855 was living near Robinsville in Graham County, says he had entered a quantity of lands near Slick Rock and was there with Mr. Piercey (J. W. C. Piercey) county surveyor of Cherokee County, who told him that the line ran up Slick Rock Creek and that that was the general reputation and that Unaka Mountain commenced at Beaver Dam Bald.

JAMES WHITAKER'S TESTIMONY.

James Whitaker, who lived near Andrews in Cherokee County, since 1873 (record, 877), and in 1898, when he gave his deposition, was ninety-four years old, says that he knew David Taylor from 1837 until he died in about 1877, who lived near Andrews. That David Taylor told him he was one of the party with the commissioners and that Slick Rock Creek was the line.

W. P. JONES' TESTIMONY.

W. P. Jones (record, 878), aged sixty-five years, who lived near Murphy, says that the general reputation was that Slick Rock Creek was the line. That he had many times carried a chain for J. W. C. Piercey, the county surveyor, who said that that was the line, and this witness says that Unaka Mountain was only so-called from the Unaka Turnpike to Beaver Dam Bald.

W. P. PHILLIPS' TESTIMONY. (Record, 879.)

W. P. Phillips, who lives in Andrews, North Carolina, says that he knew John Debity and that Debity told him the

State line ran up Slick Rock Creek, and pointing to it, said the line ran up the line to Fork Ridge and that Fork Ridge was the line running up to Big Fodder Stack, and that Debity was then living on the east side of the creek in North Carolina, as he said.

STEPHEN WHITAKER'S TESTIMONY.

Stephen Whitaker (record, 881), residing at Andrews, North Carolina, eighty-four years of age, says that he had known Tatham who was with the Commissioners, and that Tatham had told him the line ran up Slick Rock Creek and that they all got drunk and ran a straight line to Georgia and lost Dicktown, North Carolina, and that Piercey had confirmed this.

C. C. JONES' TESTIMONY.

C. C. Jones (record, 882), who was sixty years old and living at Citico, Monroe County, Tennessee, says that he knew well one Thomas Hensley, who is now dead, and that Hensley told him that he was with the party who ran the east line of Ocoee Land District, and that Slick Rock Creek was the east line of Ocoee Land District because it was the State line. The general understanding was that Slick Rock was the State line. That he knew Debity and that the general understanding was that Debity lived in North Carolina and that Debity ran across the line to avoid arrest.

R. B. MASHBURN'S TESTIMONY.

R. B. Mashburn (record, 886), sixty-four years of age, who lives in Moore County, Tennessee, states that the State line between Tennessee and North Carolina runs up Slick Rock Creek to a spur, thence up to the top of the mountain just beyond Big Fodder Stack, cornered there and ran along Big Fodder Stack to the junction. When asked how he knew, said his father told him he was with the Commissioners in 1821. He said they had camped many times on Slick Rock Creek and that he had hunted in that neighborhood, and he could not say how many times when they had crossed the creek his father would say, "Son, we are in North Caro-

lina now." He showed me some of the marked trees. One was near an old Indian trail; the Tallassee trail; that he knew the State line marks; that his father died in 1848. The witness further says that his father in law, Clinton Hudson, who lived in Cherokee County, North Carolina, three or four miles from Slick Rock Creek, right under the Hangover, told him the line ran up the Slick Rock Creek. The witness says that he found State line trees up the spur and that he saw these in 1854, and that he, in company with others, was looking for the State line to locate copper lands. That he found several trees on the spur running from the head of Slick Rock to the Big Fodder Stack, which were State line trees and were marked as such and that was the general understanding, that Slick Rock was the line. On pages 891 and 892, he gives the names of several old men then dead, who had stated that Slick Rock Creek was the line and that the so-called Hangover Ridge was not called Hangover until after you leave Hangover Peak. That of the people who had told him of Slick Rock Creek, some of them were interested with him in the copper lands and some were not.

W. P. CHAMBERS' TESTIMONY.

W. P. Chambers (record, 551), a Tennessee surveyor, whose evidence will come up again with reference to the survey of the line, for eight years was a surveyor of Monroe County, Tennessee, says that Jack Milligan told him where the State line was and that he himself was running a survey for a Mr. Albright and they stopped at Milligan's house, and that Milligan asked him what they were doing there. That Mr. Albright told him they were running the State line, and Milligan said, "The line runs up Slick Rock Creek and you can't move it." He seemed to be mad because they were trying to move the State line.

JAMES CRISP'S TESTIMONY.

James Crisp (record, 562). This gentleman was also a surveyor, and says he was told by Peary Johnson and one Calloway that the line ran up Slick Rock.

DEFENDANT'S WITNESSES ON TRADITION.

The defendant produced the following witnesses on the subject of tradition, to wit:

JAMES L. NELSON. (Record, 937.)

He says on page 938 that he was told by one William H. Thomas, who had entered two tracts of land beginning on the State line near the mouth of Slick Rock Creek, and that he wrote to this witness to get Piercey, the county surveyor, to survey them. That Frank Cooper told the witness that these surveyors made a corner tree on a spruce pine and ran right up to the Slick Rock Gap and to that ridge, and that Thomas told him that that ridge with the Hangover ridge was the State line, and to tell Piercey not to cross that line for that was Tennessee.

PLEAS HENRY. (Record, 949.)

He says that he was always told that the State line ran up over the Hangover Ridge or lead; that he was told so by Jack Milligan and Atlas Crowder, who were citizens living in that neighborhood, but old man Crowder lived between Big Fodder Stack and Little Fodder Stack. That Milligan lived on Tellasse Creek about a mile from the Little Tennessee River, right where you turn to go up the mountain toward Little Fodder Stack. That these informants were each about sixty years of age when he heard this. That they are both dead. On page 951, that Dave Orr, who is living and was one of the complainant's witnesses, told this witness that the State line ran just below his mill straight west to Hangover, and that people between Slick Rock and Hangover voted in Tennessee.

MILTON WILLIAMS. (Record, 964.)

He says on page 965 that he has always considered the Hangover Ridge as the State line and never heard it disputed until this trouble came up, and that two old men, his grandfather Ben Johnson, and Mack Carr and one Deaver

and William Williams, all told him the same thing. But, on page 968, says he never heard it talked about as being at Slick Rock Creek until this dispute came up about eighteen years ago. On page 969, when pressed on cross-examination, he said he never heard William Williams speak about it but that was the understanding anyway.

ONLEY WILLIAMS. (Record, 971.)

When asked on page 973 what he had heard old people say, answered the question 32, "I have heard different tales but of no benefit to either one, some tell one thing and some tell another."

WILLIAM R. CARRINGER. (Record, 981.)

States on page 982 that his father had told him that the line was on Hangover. When asked if he had ever heard any other person say so, he answered question 16, "I don't recollect. I have heard it all my life off and on but I don't recollect who I heard speak of it. It seems that ever since I recollect that the Slick Rock Gap line was spoken of and up by Hangover, but I don't recollect. My recollection is I heard it spoken of many times, but I don't know who it was. I cannot think of anybody who spoke of it except my father, he showed me, we were just traveling over, and he told me 'here is the line between North Carolina and Tennessee,' but I remember that it was the general understanding that the line was there."

H. H. MILLER. (Record, 983.)

H. H. Miller, living in Monroe County, Tennessee, says his uncle Joe Graves told him that he was with the surveyors in 1821. He further told him that they went on the State Ridge to Tellico River. It was foggy and they found they had made a mistake. That the next morning they sent Graves and another man back to cut out the hacks and they got onto a high peak and just made a plat, but never went back and surveyed around the headwaters of Tellico; and he says that the State Ridge was so called on account of its hav-

ing been thus surveyed. He says, "I asked him (Joseph Graves), why they called it State Ridge, and he told me." Joseph Graves is dead. He further says that without surveying, they simply made a plat around the high ridge and went on. That also an old man by the name of Tate told him how it came to be called the State Ridge. That it was the general understanding that State Ridge got its name from the mistake above mentioned, and that the real line was east of that ridge. On page 987, he says he was told that they did not survey the line east of State Ridge but just platted it. That with reference to cutting out the marks, he was told that they cut out a few and found that it was too much labor, and that it was unimportant and they quit and went back.

A. C. WILLIAMS. (Record, 991.)

On page 996, he states that when he was a boy thirty-five or forty years ago, remembered old people say that when you get to Slick Rock Gap that was as far as North Carolina went. On page 1,010 he says that Hangover Ridge comes in at the mouth of Slick Rock Creek and that he is sure of that. That the middle ridge, that is to the so-called ridge across from tree 29, does not come all the way to the river, but that the longer one goes to Slick Rock Creek. And again on page 1,016 that the main Hangover goes to Slick Rock Creek.

JOHN W. STRATTON. (Record, 1,029.)

This gentleman lives in Monroe County, Tennessee, and was eighty-three years of age. He says on page 1,031 that he had heard Levi Mashburn speak of the State line, and on page 1032, that he was told that when the Commissioners got on the top of Laurel Top, the fog came on thick and that they ran on and ran past the gap and down that State Ridge as they called it, until they got under the fog and saw they were wrong, and that they just stopped there and went right across to the top again, across the head of the stream there. And on page 1,033, that he had heard Piercey claim that the line ran around Tellico, and on 1,035, in reference to the upper contention, that he had heard his brother and others who

lived on the North Carolina side say that the line went over Hangover. His brother is dead. And that Hoyt, the surveyor, also told him the same thing.

On page 1038, on cross-examination, he says, that with reference to the conversation with Mashburn that the Commissioners did not survey but only platted the line around the head of Tellico. On 1039, that the Commissioners in running the State line found that they were wrong and crossed the stream and just let that loop alone. This story about the fog and the mistake of the Commissioners is corroborated by one Seymour, who is a lawyer in Knoxville (Record, 1034) and at page 1049 about not surveying but merely platting the mountains to the east of State Ridge and the calling of the ridge by that name, and also had heard Hoyt, on page 1,052 [on cross-examination], say the same thing. On page 1,052 on cross-examination he reiterates the statement that he was told they did not measure it around the mountain as claimed by Tennessee but only guessed at the line, and that if the report of the Commissioners is that they ran the line, measured it, marked it, and established mile posts at every mile, then what Graves told the witness flatly contradicts that report. This gentleman represented Stephenson in the Stephenson and Fain case.

On page 1,054, he says that old men in the neighborhood of the Tellico country always spoke of the line as running around the waters of Tellico and that his informants ridiculed the commissioners report.

JOHN H. HOWARD. (Record, 1,077.)

He says on page 1,078 that he knew Jack Milligan and had heard him say that the line ran over the top of Hangover. On page 1,080, when he was asked the occasion of this conversation, he answers, "I don't know that I can tell anything about it. I just crossed the river in a vessel and he and these parties were there talking and they were talking when I went up to them and I don't know what started the conversation." But he admits that he did not hear the whole conversation. On page 1,081, he says with reference to

Grant, one of complainant's witnesses, that he was an intelligent man of good memory and reliable, and so far as he knew, Milligan was not untruthful nor unintelligent enough to tell two different stories about the State line, and if Grant said he told a different story from the one reported by this witness, he would have no reason to doubt Grant's word.

JAMES FARR. (Record, 1,352.)

This witness testified in the Hebard case that he lived on the Fodder Stack Lead, east of Slick Rock Creek on the old cove; that he always understood that the line went over Hangover. That he had lived in the cove for ten years, that would make in from 1886.

EMERSON DEBITY. (Record, 1,353.)

Says he lived with his father on the land in dispute and voted in Tennessee, and it was always understood that the line ran over Hangover. Farr and Debity, the latter the father of this witness, had leases from the Beldings, which are claimants under North Carolina grants. These leases are attached to the deposition of Carver. (Record, 853 and 4.)

B. R. NICHOLS. (Record, 1,354.)

Lived on the disputed land about twelve years prior to 1896. Understood that the line was east of Slick Rock Creek.

A. D. CLINE. (Record, 1,354.)

He rented from Hebard and voted at Mulberry, Monroe County, Tennessee. Paid his taxes there and worked the road down in Monroe County.

JOHN DEBITY. (Record, 1,355.)

This witness lived at the fork of Slick Rock Creek at the left-hand prong about nine miles above the mouth of the creek. That he had always claimed that he was in Tennessee and that he once tried to vote in North Carolina but they would (not) let him unless he swore that he was in North

Carolina, which he would not do. That he understood the Hangover Lead to be the State line. On cross-examination, he denies the lease that is attached to Carver's deposition.

BOYD McMURRAY. (Record, 1,358.)

Says he was a farmer living in Monroe County, Tennessee, seventy-one years of age. Says that one Jack Milligan told him that the State line was over Hangover Lead and that the people who lived on the waters of the Slick Rock Creek voted and paid taxes and worked the public roads in Tennessee, and that one Heyt a surveyor, told him he had located the line on Hangover, but further told him that he had found marks up and down Slick Rock Creek, but that that was a bogus line.

T. E. H. McCROSKEY. (Record, 1,360.)

Testifies on page 1,861 as to the reason for locating the east line of the Ocoee Land District at the Slick Rock Creek as given by Brannum and T. G. Harvey, who were on the survey, was that the Hangover lead was the State line, but the surveyors when they got to Slick Rock Creek stopped there, because the lands east of the creek were very rough, and stopped because they were worn out and tired of the work.

We forbear to comment upon or compare the testimony for the respective parties until we attempt to sum up the case hereafter.

COMPLAINANT'S EXPERT TESTIMONY.

In the order of printing, the first expert witness called by the complainant was D. B. Burns (record, 226), at that time residing at Knoxville, Tennessee, who testified by way of qualification that he graduated at the Burnsville, W. Va., High School and in 1901 graduated at the University of West Virginia and took his degree, and thereafter was constantly engaged in surveying and woodcraft from the time he was nineteen years of age.

This witness was employed to survey and locate the State line in dispute. He commenced this survey in April, 1908,

and finished it in May, 1910. In April, 1908, he commenced northeast of the river where the State road crosses the Smoky Mountain about three and a half miles north of the Tennessee River, and surveyed from that point to the Unicoy Turnpike to the 101-mile post where it turned in a southerly course to the Georgia line, a distance of forty-two or forty-three miles. He surveyed with a transit, but says that the ordinary instrument used in these mountains when the lines were originally run was the compass. That the transit is the more accurate instrument; that with a compass you cannot hope to get accurate results, but with the transit it is possible to get almost accurate results.

He found a number of State line trees all the way from where he began along the Smoky Mountain down to the Tennessee River and up Slick Rock Creek to Big Fodder Stack and from the Big Fodder Stack to the junction along the main mountains and also toward Jenks Knob, and from there to the end of the Unicoy Turnpike at the 101-mile post, along the mountain. That wherever they found good timber he found marks just the same as along the undisputed part of the State line. That he knew these were State line marks because a person who has been in the habit of tracing up old line marks can tell from their appearance. The State lines were on fore and aft trees, a blaze and two backs, and on side line trees marked with three backs. That you can tell from the tree about the age when the marks were cut through the bark. If the axe went into the wood you can block the tree and take out the block and count the number of growths which will give you the number of years since the mark was made.

He then explains what blocking trees means. At the commencement of his surveying he took an observation on the North Star in order to determine the true meridian north and south, and says that by running an accurate line and estimating the angle between the lines, by back sights and front sights you will be able to calculate the course of each particular one. That after surveying about six miles, he took another observation of the North Star and obtained the true north and south meridian, and checked his work by the vari-

ous angles from his first observation, continued his survey to the junction of Hangover lead and Big Fodder Stack and took another observation at that point and found that his calculations checked with each other, and that that was a check on the entire work.

He says it is possible to count all angles even from the observation and count the true bearing of the line, but by taking a number of observations, it would tell you whether you had made an error in taking angles. That he checked his work from the State Road on the Smoky Mountain to the junction in three different places and was perfectly satisfied that his work was correct. That about a year afterwards, he surveyed another line, an accurate transit line, from the junction over Stratton Bald down the main ridge to Cheoah River and down Cheoah River to Slick Rock Creek and tied into the line that he had run the preceding year and found in the entire circuit practically no error at all. That this last involved about twenty-five miles.

He then produced a plat representing a survey of the State line, showing the Tennessee contention and the North Carolina contention. That in making this plat he ran a base line down to the Cheoah River and likewise to the Tennessee River and likewise to the other streams. That he surveyed Slick Rock Creek for about five miles up the stream, and the rest of it is sketched in from side notes on the field. At Tellico River he only surveyed that stream where the line crossed it. He also surveyed Cheoah River and then on his plat drew a system of coordinates, the north, south, east and west at a distance of five thousand feet and says that if you follow the coordinate system it is impossible to make an error that you cannot detect. He explains that a fore and aft tree is marked on both sides the way the line enters and the way it leaves, and the side line is marked pointing in the direction within which the line runs. A side line tree is not supposed to be on the line but near the line.

On page 232 he states that the tree marks indicate to you the direction in which the surveyor is going. The map that this witness filed, which we will come to later, introduced as Exhibit "D" to this witness' testimony, facing page 336 of

the record, and contains a list by number of the trees between the beginning of his survey and the 101-mile post, consisting of 124 trees, and this will explain the significance of the number mentioned in his answer on page 233, when he says, "This block No. 1, which shows a State line mark, is in evidence, was taken from tree No. 13, a white oak." On page 234, he says that he took the Commissioners map of 1821 and went to a point on the north side of the river opposite the mouth of Slick Rock Creek at an elevation of four or five hundred feet above the mouth of the creek, from which point he had a splendid view of the Slick Rock Basin including the principal peaks, and observed that that map for a distance of six or seven miles indicated by the mile circles, showed a practically straight course to the first decided break to the left. He determined the general bearing of that portion from the meridian shown on the plat. He took his instrument opposite to the mouth of Slick Rock Creek, set it up on the same bearing taken from the original map, and found that the bearing took him right over Big Fodder Stack. He adds that at the time he went there, he was led to believe from prior investigations made by C. Z. Denton, that the line went over Little Fodder Stack; and he expected the line to go over Little Fodder Stack, but that after using the compass for that test, he found that it went over Big Fodder Stack. He then abandoned the idea that the line could have gone in any other direction than up Slick Rock Creek and over Big Fodder Stack.

He then began his investigation for marked trees. The line northeast of the river trends southwest. Going down the line, he found near the bank of the Tennessee River a hemlock, commonly called a spruce pine, a fore and aft tree, one side of which had been blocked, which he designates on his map as tree No. 29, and for brevity we will hereinafter allude to that point as tree No. 29. The trees that he found on the north side of the river all had the same appearance as to age.

He followed down the Tennessee River about half a mile to a point opposite the mouth of Slick Rock Creek, crossed the river at the mouth of Slick Rock Creek and continued to

survey up the Slick Rock basin, surveying up that creek 4.9 miles, finding a number of marked trees. He then continued the survey up Slick Rock Creek to Big Fodder Stack lead and found a number of marked trees and blocked one of them, a fore and aft tree. This was tree No. 41, and block No. 4 is in evidence. On surveying up this creek about five miles he came to a ridge leading up the Big Fodder Stack lead. That up this ridge it looked like the timber had been burned and a great deal of the large timber had been destroyed and that the balance was not of such character as to show the original marks, but he found some marked trees leading up that ridge to Big Fodder Stack some of which had been blocked. Tree 49 had been formerly blocked. Tree 47 he blocked and that block No. 7 is in evidence. That these trees all bore the same kind of marks as to age as those trees he found north of the river on the undisputed line. After reaching the junction and proceeding, he found twenty-six State line trees, all of which are designated on the map, and to this number Mr. Gannet, another of complainant's witnesses, added some when he made his (Gannet's) survey.

Burns says he blocked two or three of these trees; one between Big Fodder Stack and Rock Stack, and another under what is called Chestnut Knob. That he only had one of these blocks there taken from the tree near Chestnut Knob, which he introduced in evidence as block No. 9, tree 78.

In April, 1909, he continued his survey from the junction to Laurel Top and found marked, both fore and aft and side line trees, on that part of the line, all of which appeared exactly the same as undoubted State line trees that he had found. That between the junction and Laurel Top there is no dispute about the line. That from Laurel Top after making two attempts, he continued his survey to Jenks Knob; from Laurel Top to the point called County Corners he found no State line trees, but the timber on that ridge was very poor, and that no timber along there would show the State line marks now, although this part of the line is undisputed. From County Corners he continued in a southwestward direction down to what is called the State Ridge,—that is the ridge upon which the State of North Carolina contends that

the State line runs. These principal points mentioned are designated in the exhibits already mentioned.

In going down the ridge to Tellico he found a number of trees, State line trees, eight of which had been blocked. He continued to Tellico River and crossed it and found tree 107, which is marked 86 miles on the right hand as you go to Jenks Knob. Across the Tellico River Jenks Ridge commences. The 86-mile tree is about a thousand feet from the Tellico River on the ridge. Between County Corners and Jenks Knob eighteen State line trees were found. State Ridge tallies with the map of 1821.

In May he went with Mr. Gannet, one of complainant's witnesses, to the 101-mile post, where the Unicoy Road crosses the State line, and they ran a joint survey of the line from that point along the main divide to Jenks Knob and tied to the line that this witness had previously run in March. Together they did a little extra work at the 101-mile post, where the Unicoy Road crosses the mountain as indicated by the plat of 1821, and runs in a southerly course to the Georgia line, and they made the investigation to find that line. They found marks, one fore and aft tree, which they blocked, and that block is in evidence, block No. 10, tree 121.

The purpose in making that investigation was to determine at what point they turned south. That the point called the 101-mile post was shown on their map. This block No. 10 shows marks precisely like those State line marks found on undisputed portions of the line. He then goes into the details of the survey from the junction back over Hangover. That although he made a careful survey and search for State line trees over the Hangover lead, he found none. He then describes the ridges that run off from the so-called Hangover, one of which runs to the Cheoah River and strikes it about five miles from its mouth, which is really a more prominent ridge than the Hangover. There is also a ridge that runs down from Hangover to the mouth of Slick Rock Creek. He then describes the sourwood tree that Hale, one of defendant's witnesses, found, and Hale claims that it is a State line tree on Hangover. He goes into some details about the character of the marks and the number of the

marks on this tree and gives this opinion: "As a surveyor, I think, in fact I know, that it never had any State line marks on it." This tree was decayed on the inside, as will appear from the evidence and testimony as we go along, and it was impossible for that reason alone to determine that it was a State line tree. This witness continues that there was good timber there sufficient to have retained marks if they had been made in 1821.

Mr. Burns continues that Mr. Gannet in making his survey, started at the 59th-mile tree, back of where this witness commenced and surveyed about 2 1-2 miles more than this witness did, but furnished Mr. Burns with a copy of his notes, Exhibit "D," is the joint work of Messrs. Burns and Gannet, and was made from a combination survey. That from these combined notes, the line from the 59-mile tree to the Tennessee River opposite the mouth of Slick Rock Creek is exactly 6.02 miles. That by the Tennessee contention, which crosses the river straight from tree 29 to Hangover Ridge, the distance to the river is only 5.47 miles. The south side of the river from the Tennessee River to the junction by Slick Rock Creek and the Fodder Stack Range is 10 miles, and that by the report of 1821 of the commissioners, the distance is 16 miles, whereas the Tennessee contention is that it is only 14. From the 59th-mile tree, bearing on Burns' map, is S. 55 degrees, 5 minutes west. On the Commissioners' map it is S. 58 degrees west, and to the first sharp turn to the left from the 59th-mile tree to Fodder Stack is by Burns' map south 49 degrees 41 minutes west; by the Commissioners' map 50 degrees and 40 minutes west, while the Hangover is south 29 degrees 8 minutes west. From the south bank of the Tennessee at the mouth of Slick Rock to the Fodder Stack is south 44 deg. 28 minutes west, and by the Commissioners' map south 43 deg. 25 minutes west. That a similar bearing on the ground from the south bank of the river to Hangover is south 9 deg. 39 minutes west. This witness states that he could find Big Fodder Stack on the plat of 1821, that Hangover does not tally with the plat of 1821; instead of breaking to the left it breaks to the right. From the Tennessee River, Big Fodder Stack is 6.67 miles.

On the Tennessee contention it is 5.9 miles from the south bank of the river to Hangover. That the distances from that first decided break to the left is 3.3 miles while the distance from Hangover to the junction is 2.59 miles and that the map of 1821 shows the distance between Fodder Stack and the junction is 3 1-3 miles, and the junction, according to Burns' map is 18 deg. 12 minutes east. The plat of 1821 shows the same course south 19 deg. 15 minutes east, while the course from Hangover to Junction is south 60 deg. west.

This witness made a survey from Jenks Knob to County Corners, around by McDaniel Bald, which is on the line contended for at the Tellico District by the State of Tennessee. That there was good timber but no State line marks whatever, and this is corroborated by all of the witnesses on both sides. That the distance around that way is 11.31 miles, while by the State Ridge between the same points it is five miles and in that five miles there are eighteen State line trees.

The North Carolina contention corresponds with the 1821 map. From County Corners to McDaniel Bald on the Tennessee contention, the course is south 20 deg. 50 minutes east, while the plat of 1821 shows a course south 54 deg. 45 minutes west for that same distance. From Jenks Knob to Rocky Knob is north 45 deg. 55 minutes west. That the nearest distance north from Cold Spring Gap to the State line ridge is 3.3 miles, so that according to that calculation there will be one point on the Tennessee contention three miles distant from where the plat of 1821 shows it to be at that place, and where the marked line also shows it.

Exhibit "B" is a comparison map of the contentions of the State of Tennessee with the line run by the Commissioners. Exhibit "C" facing page 252 is this witness' plat of the two contentions.

The witness goes on to say that his plat shows the distance from the 59th-mile tree to the 86th mile tree at 27.64 miles. That running to that tree by the Tennessee contention to the junction and then along the line down State Ridge it would be 25.56 miles. That going around Tellico, as the State of Tennessee contends, you would come out on the undisputed

line about a mile or a mile and a half from the 86th-mile tree, plainly marked. That from the 59th-mile tree to Jenks Knob in the North Carolina contention, is 28.77 miles. By the Tennessee contention 32.86 miles. By the map of 1821 it is 28.01 miles.

This witness surveyed the Tennessee River for about twenty-eight miles and states that the Cheoah River enters the Tennessee at an angle of about 80 deg., at the mouth about 30 deg. That Slick Rock Creek makes about a right angle to the Tennessee River. That the Cheoah River for ten or twelve miles is almost at right angles to the undisputed line. That the plat shows that the line followed the creek. Right opposite tree No. 29 there is a bluff on the south side of the Tennessee River 700 feet high and extending for about half a mile down towards Slick Rock Creek and up towards Cheoah River and that there is no ridge extending to the Tennessee River just opposite tree No. 29.

On page 255, this witness gives the numbers of the trees that were located by him, and on that Exhibit "D" there is also a table of comparison of distances. This map Exhibit "D" faces page 256. The witness further says Hangover Ridge is comparatively low until you get pretty close to Hangover. There are three gaps, Slick Rock Gap, Big Fat Gap, and Sourwood Gap. That the ridge rises rapidly from Big Fat Gap, the last low place. Hangover Peak is over five thousand feet high, and that the Big Fodder Stack Range to Junction is very high and is the main mountain in that locality. That Rock Stack and Chestnut Knob are prominent peaks. That Slick Rock Creek has a considerable fall from Big Fodder Stack lead, goes through a gorge and on either side there are steep mountains. The Little Fodder Stack rises more rapidly and is higher than the Hangover Ridge for the first three or four miles. From a point north of the river it look easy to get up Slick Rock Creek. From the general appearance of the territory, by viewing it from the highest peaks on the north side of the river, one can readily see that the main mountain goes to the right of Slick Rock Creek. It has greater continuity. That he made a test of

the map and survey of 1821, comparing it with his survey and the result was surprisingly accurate. He made a test of the plat of 1821 by taking some undisputed point on the line, for instance, the Tennessee River, using that as a base; drew a line to the first decided break in the general direction of the map, compared them with the general bearings in his own survey and found that the result was surprisingly accurate. That the map of 1821 does not purport to be an accurate map topographically, but only the line itself; adjacent territory was just sketched in. He then takes the wording of the Commissioners' report, "a true and accurate plat of the dividing line between the said States as settled, run and marked by us," and states that he found it be that according to the undisputed portion and according to the North Carolina contention. That this map was made on a very small scale, but that witness got surprisingly close tests that he put it to in every way, that went right over the original marks. The scale of this map is 800 poles to the inch, 2 1-2 miles. But that map shows the river to be one-half mile wide, whereas it is not over 300 feet.

He then explains why it is that that map apparently shows that the State line only went up the creek for a mile and a half, and attributes it to an error in platting the creek. There is no stream where Tennessee contends the line crosses the river. In following up Hangover, the first stream you would strike would be Hiwassee, 37 or 38 miles from the Tennessee River. That the Tellico River is 40 feet wide. That the name "State Ridge" seemed to be in general use and the name was apparently given to it because the State line ran on it. That his survey corresponded with the map of 1821 as far as he made the survey. There are two mile circles on that map of 1821 very close together at the 38th mile, which this witness (and it is corroborated by other witnesses on both sides) is of the opinion stands for the same mile circle at a point where two portions of the map of 1821 were pasted together. The trail at the 93d mile mentioned in the report of the commissioners comes out just right.

Facing page 264 is a copy of the map of 1821 used by this

witness. This witness tested the map of 1821 at the first mile tree by getting the bearings from the 59th-mile tree to the 101-mile tree, by the original plat of the commissioners and also by the actual bearing given by the witness' survey, and there was only a difference between the two of five minutes. He then proceeds to give the true location of the line as is claimed by North Carolina and explains why Fodder Stack Range would be selected. He says in coming down the Smoky Mountain to the Tennessee River, the Big Fodder Stack is almost a direct line. The Slick Rock Basin looks like it is very easy to get up and he thinks that Big Fodder Stack would have been selected from a point back on the Smoky Mountain, and after getting to Laurel Top the ridge known as State Ridge has every appearance of being the main top of the mountain, and that the marked trees would take a surveyor over the line exactly as shown by the plat of 1821, and this witness' survey, Exhibit "D."

On cross-examination, p. 267, this witness says: "I did not survey from Slick Rock up to the main ridge." "But there might be some doubt after one got to the junction in ascertaining which would be the main mountain." The highest peak at that particular point is Stratton Bald and at the junction the Hangover is from three to five hundred feet higher than Fodder Stack. Stratton Bald and Hayo are about the same elevation and in going along from there down to Cheoah River the elevation of the ridge keeps pretty well up. That from Cold Spring Knob it begins to fall until you get to the Tennessee River.

This witness surveyed his line by a transit instrument, and on page 271 explains that from the dates upon the map of 1821 he knows that the commissioners must have been hurried in their examination and notation of the line, and says, "As a matter of fact, in following along the ridge, they did not show, or did not attempt to show every nook and turn in the ridges. They sighted from the highest point, sometimes it would be a mile, and sometimes not so far; but in chaining and marking they did actually follow around the ridge, and in their platting they showed the distance from one high point to another high point straight, but they actually meas-

ured around and adopted the line upon the top of the ridges along which they marked, also the marked trees can be found now."

That in locating the line north of the river, they followed the top of the ridge. The map of 1821 from about where the 64th-mile tree would be, shows a straight line to the mouth of Slick Rock Creek. On the south side they apparently followed the creek about a mile and a half. That in examining for trees along the north side of the river, from the tree 29 to the mouth of Slick Rock he, Burns, went along there hurriedly and did not find the tree that was subsequently found by Mr. Gannet marked tree No. 30. That block No. 3 was taken out by Denton, but he was satisfied that it came out of the tree designated. That on the spur leading up to Big Fodder Stack he found no trees. That it is about four miles from Big Fat Gap to the river and about three and a half miles to Cold Springs Knob. Huckleberry Knob from Haw Knob and Laurel Top is the highest point of all. That it is not on the State line as claimed by either party. Citico Creek is entirely on the Tennessee side. The Commissioners of 1821 mention the west prong of Tellico. From Stratton Meadows to State Ridge is three miles. Further along he says, "The plat is one thing and the topography is another. The plat within itself is remarkably accurate, and if you undertake to follow the plat from any known point, it would take you across the Tellico River, but the topography is sketched on the map and does not show the line crossing the Tellico River."

The Wah-chee-see Trail strikes the line at 96 miles. Jenks Ridge runs from Jenks Knob towards Tellico. On Jenks Ridge there are three State line trees, which are described as 105, 106 and 107. Trees 106 and 107 are close together.

Reexamination.

Surveyors in rough survey always sight from one high point to another, but in measuring, follow the meanders. The straight line on the plat of 1821 from the 64th-mile tree would go over very rough country. The line they marked is the one they adopted. It is impossible to cross the river

at the No. 29 tree. A straight mile from the 64th-mile tree on the map of 1821 carries you very close to the mouth of Slick Rock Creek. That line is south 75 deg. 30 minutes west to the river; as the State of Tennessee contends from the same point is south 53 deg. 45 minutes west. Tree 29 is about twenty feet from the river and the line points to the bank of the river and not twenty feet back as marked as approaching the river.

In searching from tree 29 towards the mouth of the Slick Rock Creek on the north side of the river the witness found a tree that had a very strong resemblance to the original State line marks. That the error in sketching the creek on the map of 1821 makes the hachures, the etchings come too early. That the copies of the map of 1821 all seemed to differ. That the water divides do not correspond with the highest ridge and have nothing to do with the line. Taking the map of 1821 and starting at an undisputed point, it could not be possible to go around Tellico, nor by way of Hangover Ridge. The North Carolina contention is the only one that fits.

The report of the commissioners mentions the west fork of Tellico River, but the map does not show it. Whatever slight differences there are between the plat of 1821 and the marked line, which he found on the ground, would in no way help support the contention of Tennessee.

This evidence of Burns heretofore given was taken for use on the bill of review in the Hebard case, was adopted by a stipulation to this case, and was taken after the discovery of the map of 1821, but before the discovery of the Davenport field notes. This same witness on further cross-examination by General Cates on behalf of the defendant, testified among other things, that he first supposed after seeing that map that the line went up the creek a mile and a half and then up Little Fodder Stack. That when he went out, he received no instructions except to try and find the true line. That he very shortly, after viewing the country and seeing the map, determined that it could not go up Little Fodder Stack, but that it must run up Slick Rock Creek and the Big Fodder Stack.

As he came down on the north side of the river, the line from the northeast was making right for the Big Fodder Stack, and the map showed that it crossed at some stream and that it was Slick Rock Creek. That in order to follow the map it was necessary to follow that course. That for two or three miles the State Ridge is the highest ridge down in the Tellico Country.

On page 304 the witness gives certain elevations from the Government surveys and states that County Corners is one-half mile from Laurel Top and from Laurel Top to Grassy Point is one mile. That he found some of the State line trees had been remarked in about 1853.

He again describes what the State line marks are and identifies State line trees, and states that he was raised in the woods and was familiar with old line trees and that he has the blocks used in the Hebard case. He describes again his sighting from the north side and his taking his instrument to a point opposite the mouth of Slick Rock Creek. That he has every reason to believe that this State line was run with a magnetic compass, which varies from time to time and at different localities. That he tested his survey where he crossed the Tennessee River to the top of Big Fodder Stack, and then compared that with the 1821 map, and that he could determine from that map whether the line went up Little Fodder Stack, Slick Rock Creek, or Hangover. That the line to Georgia, the end line of the whole survey, is not due south.

He again explains the method by which surveys of this kind are made, by sighting from one point to another, and measuring around the meanders.

On page 322 he explains the variations of the needle, and facing this page is a copy of the map made for the Hebard case, which is Exhibit "D" reduced.

By the map of 1821, Slick Rock Creek appears to be about 800 feet wide, whereas it is in fact 20 or 30 feet.

After explaining again what the State line marks are, he states that there are no such marks on the sourwood tree on Hangover Ridge.

Commencing on page 337, the witness gives the elevations

from the Government contour map on the different ridges, and continues that on pages 338 and 339. The distance from where the turnpike crosses Smoky Mountain to Hang-over along the Tennessee contention is 8.53 miles, while along the North Carolina contention, the Big Fodder Stack is 10.27 miles. That the Big Fodder Stack coming north is the main ridge; that the State Ridge below in the Tellico Country is about the same elevation for two miles as the ridges around McDaniel Bald.

Speaking of tree, No. 30, he says that he found the original State line marks on it on the side up the river, a chestnut oak. That on the reduced copy of his Exhibit "A" used in the Hebard case the line from A to B is a test line. In reference to the straight line at the mouth of Slick Rock Creek at about the 64th mile tree, the witness says that he took the bearing of that line and found its intersection with the State line on the main ridge as surveyed by him, and that the surveyors must have taken a bearing from the mouth of Slick Rock Creek, which they recorded in their notes, and that the chainmen made their surveys from the mouth of Slick Rock Creek and when they platted it, straightened the distances out. That the straight line to Slick Rock Creek as actually measured is about 5,800 feet and it is 8,269 feet to Slick Rock by way of trees 29 and 30. That Little Fodder Stack is the main ridge and the others are only spurs.

On page 353 this witness says that he thinks that when the surveyors of 1821 reached the point on the Smoky Mountain where they could see the mouth of Slick Rock Creek (that is the point from which they took their bearing) they sketched in the streams instead of taking the courses and distances and showed the courses and distances on the map, and that he believes they just platted the distances and showed about straight, and that it is a matter of opinion, whether the line down by the trees 29 and 30 reaching the mouth of Slick Rock that way, or the straight line from tree 64 as they platted it, is the State line. That across from tree 29 there is just a steep mountain bluff.

On page 355, on redirect examination, this witness again states his experience as a surveyor. That the general course

of the map of 1821 took him up Slick Rock Creek and Big Fodder Stack. He says that he was handed this map of 1821 and asked to see if he could find the State line as originally run by the commissioners. That plat showed the Tennessee River on it; showed that it crossed the Tennessee River at the mouth of the stream marked "Creek," which he believed to be Slick Rock Creek. That he took the general course off of this map of 1821 from the mouth of this creek marked on it to the first decided angle that it made to the left a distance of six or seven miles from the river, and after having obtained that bearing from the meridian shown on the map, he set his compass opposite the mouth of Slick Rock Creek where he could get a good view of the high peaks and Slick Rock Basin and in that way tried to find out in what general course the Commissioners did run the State line after crossing the Tennessee River, and that he found after setting upon this bearing that it could not possibly reach the Little Fodder Stack as he had previously supposed it would; he then abandoned the idea that it could ever reach Little Fodder Stack and follow the plat. That he also found that it was impossible to go over Hangover and follow the plat. That he found that the general course of the plat took him up over Slick Rock Creek some distance, and then he found the trees up the spur leading to Big Fodder Stack and from there to the main ridge. That he was carried from his commencement point to the Tennessee River and thence to Slick Rock Creek by marks. He searched the trees and blocked some, and that the map of 1821 was a guide. That in following old maps, the rule is that where monuments can be found where there is no mistake as described in the deed, you must go to those monuments regardless of the courses and distances, whether the distances be longer or shorter, and that it would be ridiculous to expect to find everything on the ground just like the map.

That certified copies of the map of 1821 seem all to differ, that in the one used by Williams, the ridges and creek are not like the one he had and there is a difference in the path from the Valley Towns. That on the map of 1821 the width of all the streams was exaggerated and that Slick Rock Creek

is merely sketched in and wrongly and that it is exaggerated in width and length. That he believes that the Commissioners carefully measured up that creek or along the edge of it for about five miles, but it only shows on the plat that the line runs up to a mile and a quarter. That as they were going up along the line Slick Rock was the only stream on the right that they could see. That Slick Rock goes to the Tennessee at an angle of about 60 degrees; the Cheoah at about 30 degrees, and that Slick Rock corresponds at no point with Cheoah, which for seven or eight miles is north 45 degrees west; the Slick Rock for a mile and a quarter is north 30 or 35 degrees east. These courses are coming toward the Tennessee River. That the so-called straight line at the extreme south end of the map of 1821 is not due south, but is about 7 degrees out, but that it was so laid down as to enable the witness to find the true line, and on page 363 he explains why. One reason for it is that he thinks the map is pasted together in an accurate way; that that line is not in any disputed territory. That Rock Stack is the first high peak between Big Fodder Stack and the junction and about one-third of the distance.

In following up the waters of Slick Rock the witness says that that gave him the curve, a rough curve from the junction concave from the east, but that going up Hangover from the junction, the curve is in the opposite direction, the concave from the west and the former curve is the curve that was on the 1821 map, concave from the east. That the map of 1821 was a great advantage. There was a variation in the bearing in going from Tennessee River to Big Fodder Stack, and going to Hangover of 30 or 40 degrees, which he afterwards changed to 40 or 50. That the Hangover lead forks. That one fork goes down Slick Rock Creek and the other to Cheoah, but that just opposite tree 29 there is no ridge. That further along on the north side of the river after leaving tree No. 30, and about 150 feet further up the river he found a hemlock with State line marks on it. This is a tree other than No. 29 and is an extra one not on the witness's plat. That this tree was marked with a side line tree on the northeast side. That the hemlock just mentioned

was one-fourth of a mile below No. 29; that No. 29 is about one hundred feet from the bank of the river and that there are two trees marked with State line marks between tree 29 and a point opposite the mouth of Slick Rock Creek. That between the tree 29 and the creek a chestnut oak which he blocked is about 1,475 feet, and that he found that tree blocked on the east side and he blocked the western side, which is offered in evidence marked Block No. 11. That on this block he found more recent marks between the old marks and the marks made in 1853. That Gannet found this tree No. 30. That he—witness—searched on the straight line shown on the plat of 1821 from the 64th mile to Slick Rock Creek, but could find no marks, nor did he find any marks along the ridge which goes from the Hangover to the mouth of Slick Rock Creek. That the straight line of the map of 1821 from the 64th mile tree to the mouth of Slick Rock Creek runs over very rough country and that that straight line is a compromise between this ridge and the river bank. That the map of 1821 shows the State line striking the mouth of the creek, but as there was probably no tree standing in the middle of the creek, they marked a tree standing on the bank.

On page 376 he says that County Corners is recognized as the corner of three counties, Cherokee and Graham in North Carolina, and Monroe County in Tennessee. That everybody speaks of it in that way and that it has always been treated as the corner of Graham and Cherokee counties.

The witness made a careful survey of Jenks Ridge and State Ridge. That the map of 1821 is on the scale of 800 poles to an inch and it would be impossible to indicate every bend, $1/100$ th of an inch would be 132 feet and that a fair way to use such a plat would be to follow the general course. That Cheoah is a considerable stream with creeks running into it. It extends to Robbinsville in Graham County, and that Citico Creek is 30 to 35 miles long and that Slick Rock Creek and Citico head near each other. On page 383, the original map of 1821 was produced to the witness and upon notice given by the State of North Carolina to produce this map at the hearing before the Supreme Court of the United

States in this case, the State of Tennessee accepted that notice and agreed to produce that map. On page 391, the witness says that Citico Creek is on the opposite side of the mountain from Slick Rock. That the Hangover Ridge at Hayoe branches and separates into a number of different ridges; one leads to Cheoah and one to the mouth of Slick Rock, and one leads towards the river, and there are various spurs leading down between the different streams shown on the map between Bear Creek and Barker's Creek, etc.

On page 402, this witness explains the way in which he uses the term "traverse" and states further that the report of the Commissioners of 1821 in speaking of the old Trading Path leading from the Valley Towns to the Over Hill Towns, means that that is where the trail strikes the line, to wit, at the 93d mile. It leaves the mountain near the 96th mile, but that according to the Tennessee contention in the Tellico Country you will go six miles further to strike that trail.

The Davenport notes, (Record, 623) purport to be the notes of the original survey of 1821, discovered after the testimony passed on before, was taken. The authenticity of those notes was proven by the testimony of W. D. Jones (Record, 605) and Emma Harper Cilley (Record, 634). These notes were handed to D. B. Burns and other witnesses, and various witnesses have testified concerning them. Burns' testimony commences on Record, 643, and Exhibit "B B" complainant's exhibit, is a map made by this witness from these notes.

The straight line from the 64th to the 65th miles on the plat of 1821 is shown by these field notes to be south 75 degrees west, and the witness says that if you went to Cheoah you would have to go southeast and across from tree 29 would be south 30 degrees west, and that the Davenport field notes tally with the map of 1821 almost exactly. He says he found two differences; one of them is between the 71st and 72d mile, but at the creek finds that it tallies with Slick Rock Creek right along and that the Yellow Hammer Creek flows into the Cheoah River two thousand feet from its mouth. He then picks up each mile as surveyed by him and on the map of 1821, and upon these notes, and shows how closely

they correspond up to the very point where it leaves the creek. That if you attempt to apply these calls to the Cheoah River, you would find that the course of the Cheoah River is south about 45 degrees east, and that each call of the Davenport notes, even if you got on to the Cheoah River, would take you away from it. There is no trail on the Cheoah. That crossing the Cheoah River backwards and forwards would be impracticable. That you go up Slick Rock Creek at an angle of about 45 degrees and that the points mentioned on the creek are at the nearest point $2\frac{1}{2}$ miles from the mouth of Cheoah River, and that the calls take you up to Big Fodder Stack. That between the 71st and 72nd miles the call south 30 degrees west 80 poles, in order to make it conform to the ridge with the line as actually run, would have to read east instead of west. That Citico Creek is concededly in Tennessee.

He then on page 654, pursues the calls to the junction and states that you could not reach Hangover by the courses in the field notes, and that up the Cheoah River for five miles would be ten miles away from Citico Creek and that up the Hangover you would cross the trail a mile too soon. That on the undisputed line below the junction the map of 1821 and the field notes tally. He then speaks of the other error that he finds between the 11th and 12th miles. A course of the notes of south 30 east 154 poles should be west. The other error he discovered on his survey was between the 95th and 96th miles. He states that there is a call in that mile in the field notes of south 45 degrees west 80 poles, and that you would have to plat north 45 west 80 poles, and the notes show that the Commissioners went up Slick Rock Creek for five miles. That in the Tellico Country the notes tally with the North Carolina contention, and at the end of the 86th mile, speak of the holly tree marked, and that tallies. That from the Tennessee River to that 86th mile, there is a difference in the witness's surveyed line and the plat of the Commissioners of about a quarter to half a mile, but the shape is exactly similar by his survey, by the field notes and by the map of 1821, but that the line as claimed by Tennessee has no resemblance whatever. That the field notes and the

map of 1821 agree except as to where the witness has stated the difference. That the map of 1821 shows that the Indian path which reaches the line at 93 miles, runs with it about two miles.

On page 661, upon cross-examination, he says that to reach the 86th mile tree you must cross the Tellico River. Further, upon cross-examination, counsel required Mr. Burns, the witness, to produce and read into the record his field notes, commencing on page 663. On 666, the witness says from the north bank of the Tennessee River opposite the bank of the Slick Rock Creek to the mouth of the creek is south 41 degrees, 50 minutes west. This differs from the field notes, evidently because the field notes adopted a straight line lying south 75 degrees, west 320 poles. From the 64th mile tree to tree 29 is 49 degrees 24 1/2 minutes west. Burns's plat of the field notes is shown in the record facing page 1560.

On page 674, he explains why a certain line from the mouth of the creek is given as practically a south line, without putting in all the little kinks and bends in the creek. On page 676, he says that the error in the notes of south 30 degrees west, which should be south 30 degrees east, Mr. Burns found was an error because the latter conformed to the ridge and the survey and marks.

On page 679, Mr. Burns gives the calls of his survey north of the 86th mile tree, and upon reëxamination, on page 683, he explains that there is no discrepancy between the field notes and the map of 1821 at the Equoneetly Path. On 684 and 685, he speaks of the error at the 72d mile; how he came to correct it and states that the mark at the 75th mile would have corrected the error, and also details the error in the sketching of the creek, but that the Davenport notes substantially complied with the line as the Commissioners were directed to run it. The Davenport notes would make the line a little longer by taking every little angle. He also mentions the white oak at the 72d mile and the effect of lapse of time on marks and in making his conclusion, that so far as this white oak was concerned, he could not tell whether this

mark was a State line mark, but just beyond it he found undoubted State line marks.

On further cross-examination, page 687 of the record, states that he did not understand the etching of the 1821 map, and that the courses and distances on that map were the same as on the field notes and that there is no creek existing in that country at all as shown on the 1821 map and that the marked trees show the true line.

On pages 690 and 691, there is questioning with reference to a stone or maple marked "W. D. R. A." near the Hiwassee River, which it is insisted by complainant were the initials of the two surveyors who made the survey of 1821, to wit, Wm. Davenport and Robert Armstrong. The Davenport field notes by this tree was marked with certain initials; these initials complainant says are given by the field notes as "W. D. R. A.," while defendant insists that they are 1 X D. R. A. The witness, Burns, was examined in regard to this and first said that they looked like 6 X. D. R. A., but on a more careful examination of them he said that he was satisfied that they were W. D. R. A., and meant Wm. Davenport and Robert Armstrong, and that it was in accordance with certain of surveyors to mark such trees with their initials at times, and that this fact, confirmed his opinion, that the true reading of the field notes was W. D. R. A., because Wm. Davenport and Robert Armstrong were the surveyors in running this line between the States of North Carolina and Tennessee in 1821.

The next witness called by the complainant was

S. S. GANNET (Record, 408.)

This gentleman is in the employ of the United States Geological Survey and is engaged in topographical surveying. His position in that department is that of Geographer. He was educated in the schools of Augusta and Bath, Maine; Bowdoin College, Maine; and in the Massachusetts Institute of Technology at Boston, and received instructions in astronomy from Professor R. S. Woodward, present head of the Carnegie Institution in Washington, as well as a man of large practical experience in surveying lands in mountainous coun-

tries, and is thoroughly acquainted with woodcraft, and in 1882, 1883, 1884, 1885 and 1886 surveyed the Western North Carolina country.

In running the boundary line, he details his experiences, and on page 410 says, "I was detailed to the Indian Bureau of the Interior Department to locate the intersection of the 107th meridian with the Colorado-New Mexico boundary line by means of the marked line; and again in 1898 I was detailed to assist in the work of locating the boundary line between Montana and Idaho, starting where a certain Meridian crosses the Bitter Root Mountain, and established that by astronomical observations. In 1908 I was engaged throughout the season in remarking and re-tracing the boundary line between Idaho and Washington for a distance of about 120 miles."

On May 31, 1910, he was appointed by the Supreme Court of the United States as one of the three Commissioners to mark the boundary line between Maryland and West Virginia. That in his early years all of his work was mountain work from Maine to North Georgia, and that he has been on all of the prominent mountains on the Allegheny and Appalachian ridges.

On page 411, he testifies how he became connected with this work. He says the Attorney General of North Carolina requested the Geological Survey to investigate the question pending between the States of North Carolina and Tennessee relative to the location of the boundary line between them and to find out if possible where the original line was run and marked, and that he was directed by the director of the Geological Survey to engineer the work. That he was to actually go on the ground and find out from his knowledge of the country and experience in such matters where the original line was actually run and marked. That it was his duty to find out the truth about where the lines run, regardless of whom it affected. That he entered upon this work in the latter part of April, 1910.

On page 412, he says:

"I started from Murphy, North Carolina, and went first to the 101st mile post, where the Turnpike crosses

the Unicoy Mountain, and then I ran a line Southward. Mr. D. B. Burns was with me with some other men. Mr. Hugh Sadler, of Tennessee showed us where the 101st mile post was and he accompanied us down the line to aid in the identification of the line."

He said he investigated in the neighborhood of the 101st mile post to ascertain if it had been correctly located and ran a line southward and identified several trees and blocked one tree, which proved to be the original mark of 1821, as the growth of that tree was eighty-eight years. That the block produced by Mr. Burns is that one that he refers to. That he found one fore and aft and three side line trees.

He then ran a line Northeast of the 101st mile post; and found several marked trees and he identifies and says that he signed the map Exhibit "D." That he ran then along the undisputed line to Jenks Knob, having with him the map of 1821, and on the way to Jenks Knob found twelve State line trees. He surveyed on down Jenks Ridge and up State Ridge and found several State Line trees. He found twenty State Line trees between Jenks Knob and County Corners. From Jenks Knob to County Corners this witness made a survey independent of Burns, using the same instrument that he used in the survey of the line between Idaho and Washington and employed the exact methods approved by the United States Government. That as he came on to Jenks Knob and to County Corners he found that his survey tallied almost exactly with the map of 1821, and that by going around by McDaniel Bald it would not tally with that map at all.

That in making that survey the line crossed Tellico, that you cannot help it. That around by McDaniel Bald is twice as far as by the State Ridge line. That he did not go around by McDaniel Bald because it was obviously so far out of the way according to the map of 1821, and the marked line, that he decided that the line could not have gone that way. The line as marked agrees with the 1821 map. That he went along the Hangover lead and investigated every course for marked trees along that lead, and found no State Line marks, either from the Junction to Stratton Bald, or along Hang-

over. Nor did he find any on the ridge from Hangover to Slick Rock Creek. That the sourwood tree was the only one that could by any stretch of the imagination be called a State Line tree. This was on the Sourwood Gap. The tree was decayed inside and it was impossible to tell its age from the block and the marks and hacks were apparently put there promiscuously and were not State Line marks; it stood in an open space near a trail and a place that had evidently been used as a camping place.

That he went along Rock Stack to the Fodder Stack and down Fodder Stack lead to the forks of Slick Rock Creek. That from the junction down that way he found a number of trees well marked, apparently State Line marks, corresponding in age and appearance and other respects with the State Line trees on the undisputed portion of the State Line. That he went on to the Little Fodder Stack Lead sufficiently far to prove whether there were any State Line trees on that or not, and he found none. That in going down Fodder Stack Lead towards the forks of Slick Rock Creek he found a hemlock State Line tree, but further along the timber had been apparently burned, and just above the mouth of Slick Rock Creek he found several well marked trees and he identified eight trees above the forks of Slick Rock. These trees were marked with the same instrument; that he found twenty-six trees between the Junction and Big Fodder Stack; ten between Big Fodder Stack and the course of the ridge down to the creek, and from there to the mouth of the creek eleven trees; in all forty-seven trees, all of them State Line trees.

That the 1821 map carries you over Big Fodder Stack route to forks of Slick Rock Creek and thence to the mouth of Slick Rock Creek, and the marked line carries you over the same line.

On the other ridge between Stratton Bald and Hangover the timber is scrubby, but below Hangover the timber is good, suitable for marking in 1821. The timber is good at Sourwood Gap, and after careful examination, they found no marks that indicated that they were State Line marks on the

Hangover Ridge. There were one or two that were marked promiscuously. That from the mouth of Slick Rock Creek he crossed the river and followed the line along the Smoky Mountain to the 59th mile.

On page 418, he says with reference to the work of D. B. Burns, "I would say that I found his work certainly the most accurate of any work I ever had any dealings with; especially considering the fact that it was in such a rough country, I have never known work to be so accurate in such a rough country."

He went to where the wagon road crosses the Smoky Mountain, Burns' Station zero, and then followed the undisputed line Southwestwardly. The marked trees there were just like those that he found below. Coming down the line on that side of the river, the Big Fodder Stack seemed to be a very prominent land mark from near the 59th mile tree. Sighting along the line to the Tennessee River, Big Fodder Stack is the most prominent summit in the line. Surveyors coming down that way would most naturally select the Fodder Stack. You could see it a mile North, and their route would lead them directly toward it, and it would naturally direct the attention to Slick Rock Creek as the easiest way to reach it. And this coincides with the 1821 map. The other route was entirely too far to the left or East. He found the hemlock tree No. 29 near the river. Just across from there there is a very steep bank, almost inaccessible, 800 feet high, spread out up and down the river for three-quarters of a mile, which was not a practicable route, it was too steep. It was practically impossible to survey a line up and down that bluff.

Continuing down the river from Tree 29 on the north bank I found a Chestnut oak, a fore and aft tree, a State Line tree. Further down it was more rocky, and opposite Slick Rock Creek was a solid ledge. Fodder Stack averages higher than Hangover. The latter is more broken and has deep gaps in it.

That he ran up the ridge to Big Fodder Stack in a Southwest direction, just as is claimed by the State of North Carolina. The line was shown running up Slick Rock Creek by the Ocoee District map. The Slick Rock runs through a steep

gorge with steep bluffs on one side and then on the other. That it goes down a steep descent about 100 feet to the mile. The Fodder Stack is the leading ridge, of greater average altitude and continuity. Down the Little Fodder Stack the average is much greater than Hangover, which is more broken and has more deep gaps. The ridge around the head of Tellico has a greater average height than the State Ridge but is a good deal broken.

From County Corners the natural course would be along State Ridge. The main ridge really turns about at right angles to the east. The State Ridge is not so flat; more of a backbone and for some distance from County Corners State Ridge is higher. From Hangover to the junction the elevation is greater than to the Big Fodder Stack Junction. Complainant's Exhibit "E" was here offered.

The Government contour map shows the line on Slick Rock Ridge and Big Fodder Stack in a general southwest course and then a little east of south to the junction, the same as the North Carolina contention. At Tellico it supports the Tennessee contention.

He then speaks of the maps of this locality in the Congressional Library at Washington.

On the North this witness extended his survey as far as the 59th mile tree, and he says that our map Exhibit "D" corresponds exactly with data that he obtained on the ground, and the list of trees given were all on the North Carolina contention and none on the Tennessee contention. He then gives a list of the trees that he paid particular attention to and states that he found tree No. 30 and also No. 46, marked "N. C. 5 M." south of the river. That on Gannet and Burns' map from the 59th mile tree to the Tennessee River is 6.02 miles. On the map of 1821 it is six miles. This is to the mouth of Slick Rock Creek. By the Tennessee contention it is only five and one-half miles to the river. By the North Carolina contention the line corresponds with the 1821 map. To the Big Fodder Stack from the south line of the Tennessee River is 6.67 miles and from there to the Junction 3.3 miles, or 9.97 in all. And from the 59th mile tree to the Junction by our survey is 15.99 miles, and 16 miles by the

map of 1821. By the Hangover from the south bank of the Tennessee River to the junction is 8.51 miles, and from the 59th mile tree 13.98. That the stream marked creek on the map of 1821 cannot be anything else than Slick Rock Creek. The mouth of Cheoah is more than one and one-half miles to the east and could not possibly be the stream marked "creek." That Slick Rock is almost at right angles to the Tennessee River. Cheoah at a very acute angle. Cheoah runs southeast and the creek southwest. The map of 1821 is a map of a line, not of the general topography. That the topography was simply sketched in. That it would have taken months to have accurately mapped that country topographically at that time, and that Hale's map is very inaccurate, and he details the inaccuracies of that map. There were several ridges omitted, especially one leading from Big Fodder Stack to Slick Rock Creek, and it does not represent Slick Rock Creek accurately, nor the heights of Fodder Stack and Hangover. Also in other respects it is inaccurate.

That the first knob on the Fodder Stack is only a mile from the river, and that you have to go on Hangover three miles to reach that altitude on the ridge between Slick Rock and Bear Creek. That the first peak on Fodder Stack Ridge is 1,700 feet, while at that distance the first peak on the other ridge is 800 feet. That there is no doubt in his mind that the Commissioners went up Slick Rock Creek and that in the Tellico region from Laurel Top they went down the State Ridge, crossed the Tellico River and up Jenks Ridge. That the marked trees alone would show that the line went up Slick Rock Creek. That the map of 1821 alone would show it. And without either, the Commissioners, in his opinion, would have naturally selected it. And the same consideration is applied to the State Ridge. That it was not possible to reconcile the 1821 map with the Tennessee contention, and it tallies exactly with the North Carolina contention. And that by the courses and distances on the map of 1821 they could locate the objects, for instance Big Fodder Stack.

On cross-examination this witness says that he got Hale's elevations from his testimony, and that you approach the Tennessee River from the north in a southwest direction.

That he surveyed from the 101st mile to Laurel Top. He says he could locate the line with the aid of the 1821 map. Tree No. 30 is a chestnut oak thirty inches in diameter, two hacks and a blaze on the west side and the same on the east side.

That there are no State Line trees on the line around Tellico River.

On re-examination he says the straight line from the 101st mile tree down is an undisputed part of the line. That surveyors in mountain surveying take a general bearing, but in measuring, measure around meanders. That if you go around Tellico River that you deviate from the plat of 1821. That he tested Burns' notes from the Junction to Big Fodder Stack and on down the Slick Rock Creek to its mouth. That he had the geodetic co-ordinates of Hayo to Fodder Stack. He says that he wanted to prove to his own satisfaction whether or not the work was correct and from these geodetic co-ordinates he computed the air line distance between Hayo and Fodder Stack and found a difference of only six feet out of nearly twenty thousand feet between his computation and Burns' notes, and this proved that the survey around Slick Rock Creek was absolutely correct. The proper interpretation of the 1821 map is that the line follows the creek. That the hachures are sketched in. That it would not be possible in running a line from Virginia to Georgia to follow the water divide and make it anywhere near Tennessee.

On page 444 he says that there (is) nothing misleading in the plat of 1821.

Upon further examination by General Cates, Attorney General of the State of Tennessee (Record 445) he says:

"I was deputed by the United States Government to make this survey."

On page 446 he corrects some of the testimony he had given as written out, and on 447 states that the map of 1821 by courses does not go around the Tellico River.

On the following pages he corrects some statements about maps that were taken from the Congressional Library. On 452 his attention is directed to the Cession Act and on 454, he gives courses and distances from the 101 mile south and

afterwards reiterates that the map of 1821 according to direction would not go around Tellico. That he surveyed from the turnpike $3\frac{1}{2}$ miles northeast of the river to the 59th mile, and tested Burns' work from the river to the $3\frac{1}{2}$ mile point and gives the courses and distances from the turnpike to the 59th mile tree.

That Hayo Peak is southwest of Hangover Peak and that the average of Fodder Stack is equal to Hangover; that Stratton Bald is one-half mile from Junction and from Hayo to Junction is $2\frac{1}{2}$ miles. That Hangover Peak is little less than six miles from the Tennessee River. That the sourwood tree was decayed. That Fain was with him on the lower part of the survey and pointed out some trees. That the State Ridge in that section ends about a quarter of a mile from Tellico River. That the 86th mile tree is about two hundred feet above the river. That the line around McDaniel Bald could not possibly agree with the map of 1821. That the Tennessee River at the locality of Tree 29, is 1,200 feet above sea level, and he then proceeds to give elevations taken from the Government contour map. That on the spur or ridge that leads from Slick Rock Creek up to Fodder Stack the timber is practically destroyed by fire.

On page 474 he states the divergence from the stream marked "creek" as shown on the map of 1821. That Hangover Peak is $4\frac{1}{4}$ miles from Cheoah River to the nearest point northeast. It is north 45 degrees east. That in surveying the line along the creek, Burns crossed the creek twenty-nine times. That the general course of the creek is southwest, and at a point half a mile from the river it runs 2,000 feet due west, or nearly due west.

On page 478 he says that no map is made that is absolutely correct, and that in making their survey, (the Gannet and Burns survey) they followed the meanders. On the map of 1821 the creek is not drawn carefully. That there may be a difference of opinion as to which is the main ridge on the southwest side of the river.

On page 483 he says that Brazier's map of 1833 shows the line going up Slick Rock Creek. That Cheoah River is several miles east of the line. That the course down the State

Ridge agreed very closely with the 1821 map; so closely that if left no doubt in his mind as to where the line runs at that point. At the Tellico River neighborhood the United States contour map does not tally with the 1821 map. According to the scale of that 1821 map, an inch is 13,200 feet. That the map only shows in a general way the summit of the mountain and some of the streams and rivers. That it is customary in making such maps to sight from one common object to another, and on page 492, he explains again that the total bulk or mass of the Fodder Stack Ridge would be greater than Hangover Ridge, which is short as compared with the main Fodder Stack Ridge. That the Little Fodder Stack strikes the Tennessee River one mile below Slick Rock.

He then goes on to give certain altitudes taken from the Government contour map, including altitudes on the Ridge to Cheoah and the one spur to the mouth of Cheoah, and reiterates that the ridge to Cheoah averages higher than even Hangover and Big Fodder Stack. He then mentions the ridge on the north to a point opposite the mouth of Cheoah and states that it averages as high as Smoky Mountain, but for the Tennessee River, which would seem to be a continuation of the ridge that goes to Hangover from the mouth of the Cheoah. That there are several other ridges from Hangover to the northeast, and one approaching the mouth of Slick Rock about a mile long. It commences at the river with a bluff about seven hundred feet high, and there are bluffs all along the south bank to the Slick Rock Creek, so it would be difficult to walk or survey a line. That the distance of 6.02 miles from the 59th mile tree to the bank of the river coincides with the 1821 map. That the words in the report of the Commissioners from the Tennessee River to the main ridge, and along the extreme height of the same to the place where it is called Unicoy, would not indicate that when you crossed the river that you were then on the main ridge, and that in his opinion there is no main ridge until you reach the Junction. That the ridges spread out like the fingers of a hand and that the black line at the center of the shading on the original map is the State Line, and that that line strikes exactly in the mouth of Slick Rock. That the certified copies of that map differ

from the photographic copy in that respect. That by taking a straight line from the 64th mile tree south 75 degrees west 320 poles, you would land right at the mouth of Slick Rock Creek. That in looking towards Cheoah you were looking southeast on the left hand. That Slick Rock is on the right hand. That the Cheoah would be 50 degrees east, and from the 64th mile tree more than a mile to Cheoah. That a line south 75 degrees east for a mile would not reach Cheoah, but would land you on the south side of the river a quarter of a mile from Cheoah.

On page 500 the Davenport notes are taken up, and the courses and distances and objects named in that report called to the attention of the witness, and he demonstrates that the calls would not in any sense correspond with the line up Cheoah. It would not be possible to fit them to Cheoah, and that by going up that river you would be going away from Hangover Ridge further and further all the time. That Citico is on the west side of the Fodder Stack and runs west. That at the 72nd mile you would certainly be between Slick Rock Creek and Citico Creek, at least five miles from Cheoah, and at a point seven miles up the creek line, the point mentioned in the notes would be ten miles from Cheoah, and a point seven miles up Cheoah would be six miles from the Hangover Ridge.

He reiterates that the Slick Rock Creek is incorrectly sketched on the 1821 map. That the courses and distances of the Davenport notes from the 72nd mile would land you at the Junction, and that the Commissioners evidently did not reach the main mountain until they reached the junction.

That the course below from County Corners is southwest. That the other course claimed by Tennessee is almost exactly southeast. That the State Ridge goes southwest and the Commissioners report says southwest. That the 86th mile Holly tree is several hundred feet southwest of Tellico. That by the Tennessee contention you would not reach that tree at all by a mile and a half. That the nearest point would be Jenks Knob. That the Davenport notes as to the 86th mile tree correspond with the State Ridge Line.

He then describes marks on that tree and goes on to state

that you could not reach the 101st mile in going around the Tennessee contention in 101 miles. That Grassy Top Peak is a short distance southwest of County Corners, on the State Ridge, and is 5,200 feet high. Huckleberry Knob is three miles northeast of Laurel Top, 5,500 feet high. Hooper Bald is one mile northeast of Laurel Top and is 5,500 feet high.

On further cross-examination, he says that the State Ridge is southwest, and for two miles is higher than the other ridge. That from the plat of 1821 and his other information, the witness could see that the line could not diverge as claimed by Tennessee.

He then speaks again of Tree No. 30, and states on page 511 that he was six weeks on this survey. On page 513 he gives the courses and distances of the 86th mile tree across the Tellico River. On page 517 the Davenport notes were taken up again, and on page 518 the subject is pursued with reference to the incorrect tracing of the creek. On page 519 he states that Tree No. 25 is supposed to be the 64th mile tree. That the line from the 64th mile is nearly due west. That Tree No. 25 is 1,550 feet from the river. That in all maps between successive mile marks there are a number of turns or angles not shown on the map.

On pages 522 and 523 and 524, the altitudes are shown by the Government contour map and are gone into further. On 526, the witness says that he had never seen the original of the 1821 map, but speaks of the two mile circles very close together at about the 39th mile as being indicated for the same mile circles.

That Cold Spring Knob is 3,500 feet high and three miles from the river, and the subject of altitudes is then continued.

Commencing on Record, page 529, Burns notes on the survey north of the river are introduced, and on page 539, Gannet and Burns' notes from the 101st mile northeast to Jenks Knob.

On page 692 of the Record, this witness testifies with reference to the Davenport field notes, and says with reference to the wording "crossing the Tennessee River to a large white pine, south side of the river at the mouth of a large creek, 65th mile," he recognizes as leading to Slick Rock Creek.

That that call means at a large white oak at the 64th mile; that from the 64th mile to Tree No. 29 is south 30 degrees west, and that it is southeast to the Cheoah River. That the field notes fit the 1821 plat, but do not fit Cheoah because its situation would lead southeast. That there is no stream opposite Tree 29. There is a bluff there. That Yellow Hammer Creek runs into the Cheoah and there is no creek for several miles below Slick Rock; and that if you went along Cheoah you would cross no stream in following any ridge.

In explaining the difference between the marks and that straight line, he said that the surveyors evidently sighted from the bluff north of the river to Slick Rock Creek, but not being able to follow that sight, traversed along the shore of the river and crossed it at the first available point.

That the line south 75 degrees west from the 64th mile tree corresponds with the course shown of that line on the map of 1821, and would be in the line with Fodder Stack. That Cheoah River could not be crossed and re-crossed except by boat. That according to the Davenport field notes the creek is not mentioned after the 70th mile, which indicates that they then left the creek. That there is no creek in that country of the shape of Slick Rock, as depicted on the map of 1821; that the creek was evidently merely sketched in.

On page 697, he says the line is accurate, but the river and sketching carelessly done. That the field notes and the map of 1821 correspond with the line as claimed by North Carolina, but not at all with the Tennessee claim. The field notes at the end of the 72nd mile say, "on a ridge between the aforesaid creek and Citico Creek," which would correspond with the line up Slick Rock Creek. That Citico Creek does not head on Hangover, and it cannot tally with the Tennessee contention. That the notes confirmed the 1821 map and agreed with Burns' map, and that Burns' map of a portion of the line made by the Commissioners of 1821, tallies with the original map of 1821. That at the 86th mile, the Davenport notes call for a Holly tree, which is the tree heretofore designated as the 86th mile tree. That the notes also confirmed the North Carolina contention at Tellico. That the line north of the river is south 49 degrees 24½ minutes

west, but south 30 degrees west in crossing the river, according to the Tennessee contention. That the 59th mile tree is marked "59 M." This witness verified Burns' notes from the 3½ mile point of beginning of Mr. Burns to the river, and the notes of the survey of Slick Rock Creek and the courses and distances, and identified the trees. That the line practically follows the creek. That Fodder Stack is south 45 degrees 50 minutes west.

On page 708 that the last call in the 72nd mile by the notes as south 30 degrees west, should be 30 degrees east. He says this mistake would not throw the whole plat out, but would only swing the course a little. The mistake is in one call only.

On page 711 he repeats that the surveyors must have sighted from one summit to another, but measured along the meanders of the mountains, which he states again on page 712, and adds that you have to generalize in every survey. That the error at the 72nd mile would not disarrange the whole survey. That you would have to correct the error and accept the marked line, and explains what approximation means in surveying, and on page 714, what he means when he speaks of the course being approximately correct. He further explains why there was no error from the 53rd mile to the Equoneetly Path. And further on page 717 explains his use of the term "approximation."

Among the local surveyors called by the complainant, was

R. W. COLLETT,

who testified (Record 547) that he had surveyed the line on the State Ridge and remembers the holly tree at the 86th mile, and gives certain grants issued by the State of North Carolina in that territory, which he had surveyed, and files a map of his survey, facing page 550.

W. P. CHAMBERS,

who lives in Bradley County, Tennessee, had been County Surveyor of Monroe County eight years. He had had some experience in trying to arrest a man on disputed territory on a Tennessee writ, but abandoned it. He had in about 1882 made a survey of the land between Slick Rock Creek and

Hangover for one W. L. Albright, who directed him to survey from there. About that time H. M. McCroskey began talking about making an entry there, and the witness informed McCroskey what he was doing. Both Albright and McCroskey made entries, but the Governor refused to issue any warrant. This witness says that he had the map of the Ocoee District and that he started a survey north of the river from State Line marks there. This was a subsequent survey made recently in connection with a Mr. Mayfield in the interests of Mr. Cozad.

He says from the north when you look directly south, the Hangover Peak shows up a little more prominent, but in a general way the line up Slick Rock Creek and Fodder Stack seems to be the most prominent way to get out, because if you cross the river immediately you butt up against a considerable bluff, and when you get up to Hangover, you have a decline and it is so rocky you cannot get up there. That it is rocky on Slick Rock Creek, but as you gradually walk to Fodder Stack Lead, it has the appearance from there of being a smooth ridge. That the line seems to be in the general course of the State Line on the North, while Hangover is south. That he found Tree No. 29 and just opposite there was rough steep mountain land. That in going down the north side of the river towards Slick Rock Creek he also found a chestnut oak marked with three hacks, and a little further found a maple marked. And just below the mouth of Slick Rock found a gum that was marked. All of these trees were marked with old marks.

That the next day he resumed work at the mouth of Slick Rock Creek and that he found marked trees up the creek and up the ridge to Fodder Stack and from there to the Bald. That the marked trees on Slick Rock satisfied him that the line went up that creek. These marks seem to have been made at the same time, with the same instrument, and in the same manner.

On page 557 he says he made an unsuccessful effort to survey Hangover. On 558 he speaks of having been told about the line running up Slick Rock Creek by Milligan, which we believe has already been mentioned. He then goes on to say

that the map of 1821 takes you up Slick Rock Creek, and from there to Big Fodder Stack. On 550 he says that the trees he found marked on the north side of the river between Tree No. 29 and Slick Rock Creek were marked on the north side running in a westerly course; marked as if going down the river, except the gum, which is below the mouth of Slick Rock Creek. He then describes how surveyors mark trees. On 561 that the marks on the gum indicated that the marker crossed the river and went up the creek. That the Ocoee map shows the line going up the creek, and that there are no grants in Monroe County, Tennessee that call for land beyond Slick Rock Creek.

JAMES CRISP (Record 562).

says that he went out with one H. M. Kent, a surveyor representing the Babcock Lumber Company. That they went on the north side of the river and got onto the undisputed line, but had no instruments with them, and that Kent took a stick and sighted back on the line and then sighted in the other direction on the same bearing, and that it pointed right to Big Fodder Stack and the Slick Rock Creek. That they then went down and struck the Tennessee River and investigated Slick Rock Creek and they reached the conclusion that the line ran up Slick Rock Creek and Big Fodder Stack, and Kent said he would so report. That they investigated the Hangover Ridge but found no old marks.

FRANCIS H. LOVINGOOD, (Record 565).

This witness speaks of the Tellico Country first, but says that he began his survey at the mouth of Slick Rock Creek and went up the creek five miles and then up the ridge to Big Fodder Stack and thence on around to County Corners and thence up the State Ridge running in a southwest direction, and that he has notes of that survey and that he found State Line trees along that line and found the 86th mile holly tree, twenty-one miles from the Tennessee River. That he blocked some of the trees and counted the growths and satisfied himself that the marks were State Line marks of 1821.

From Laurel Top the State Ridge is continuous and from County Corners to Unicoy the ridge seems to be the same

ridge. That although he searched, he never was able to find any State Line marks on the line around Tellico River. That in order to take that line as claimed by Tennessee, you would have to run southeast at a right angle to the State Ridge. That there is a spruce pine near the 86th mile tree with three hacks on the southwest side. That he found marks on the Slick Rock Line and on the ridge. During this survey, he says on page 570 that running up Slick Rock five miles they marked a five mile tree there at the point where they turned up the ridge.

On cross-examination, he says that this survey was made in 1897, and that it seemed to be the understanding of the citizens there that Slick Rock Creek was the line. Hyde, another surveyor, was with him on this occasion. That they formed their opinions separately but agreed as to the true State Line, and they found plenty of marked trees on it, and at Tellico they decided from the marks that State Ridge was undoubtedly the line.

C. L. SLAGEL (Record 753).

who resides in Macon County, North Carolina, says that he was with Burns on one occasion. He says they could see Slick Rock Gorge from a point 600 feet north of the Tennessee River, and that following the calls of the Davenport notes the stream marked "Creek" could be no other than Slick Rock Creek. That he found a birch described in the notes at the 67th mile, a sycamore at the end of the 68th mile, and a maple at the end of the 69th; a birch at the end of the 70th mile and an old tree and some old marks, old enough to have been made in 1821.

In general he corroborates Mr. Burns as to the trees mentioned in the Davenport notes as they discovered them. That they then went to the junction then turned and came back by Hangover, and searched for trees, but found no State Line trees. That the Davenport notes carry the line along the creek and that nobody who made those notes could have made them unless he surveyed along that creek. That they could not fit the Tennessee contention at all. That about $6\frac{1}{2}$ miles southwest of the Tennessee River they bend to the left, whereas

the Tennessee line bends to the right; and the notes confirm the North Carolina contention.

On page 765 that the Fodder Stack is the main ridge, and he speaks of the bluffs just opposite Tree No. 29.

On page 775, he says that in his opinion the streams and mountains on the map of 1821 were merely sketched in. That the Davenport notes generally follow the stream. On page 777, that from a point three miles northeast of the river, the Hangover does not appear to be the main ridge. That it is not as well a defined ridge as the other towards the river.

H. S. HAYS (Record 794).

This Hays and J. C. M. Bogle surveyed the line back in 1896, or thereabouts, for use in the original hearing of the case of Hebard against Belding and others. They were seventeen days on this survey and on searching on Hangover ridge they found no State Line marks. On page 796, he says that the black oak spoken of by Hale is not a State Line tree. He describes the lines and furthermore states that the sourwood was not a State Line tree and gives his reasons, and adds that there were no State Line trees from Big Fat Gap to the Junction. That the main lead of that ridge goes to the Cheoah River from Hayo. On 797 he says that he ran the line up Slick Rock Creek to the ridge and to Big Fodder Stack and thence to the Junction, and that he found forty-one marked State Line trees on that line; ten fore and aft and thirty-one side line trees, and that there were twelve State Line trees from Slick Rock Creek and Big Fodder Stack Gap Branch. That Tree No. 1 was a cucumber and that Exhibit "A" Block was from that tree. That the marks were seventy-six years old, this survey having been made in 1897 instead of 1896. That the second tree was a birch and the third a poplar, and trees 4, 5 and 6 were birches on the east side of the creek, State Line trees. No. 7 was a lynn on the east bank of the creek. The 8th was a spruce pine standing on the east side of the creek, and Block B, was from No. 8, these blocks having been introduced in the Hebard case. Nos. 9, 10, 11 and 12 were spruce pines on the east side of the creek, State Line trees.

On the ridge to Fodder Stack and to the top of Big Fodder Stack, they found five fore and aft and eight side line trees. That No. 14 was a spruce pine about 12 poles from the mouth of the creek; No. 15 was a spruce pine side line tree; No. 16 was a spruce pine marked as a State Line tree.

That the general course of the creek carries you up the ridge to Fodder Stack. That No. 17 was a spruce pine stump, fore and aft. No. 18 was a spruce pine fore and aft; No. 19 a spruce pine side line tree.

He then goes on locating and describing all of these trees up to and including the 41st, several of which were blocked (on pages 800 and 801), and states on page 800 that from where the ridge strikes the main lead to the Fodder Stack and to the junction he found seven trees, two fore and aft and five side line trees. That these forty-one trees all had old marks on them. All were marked with the same kind of axe. That the marks on Hangover were not with the same kind of axe, but an axe such as Piercey used, and that there were no marks there earlier than 1851. That the trees along the Fodder Stack are mostly chestnut and oak. That the chestnut does not hold marks as well as other trees. That the Ocoee land district map corresponds with this witness's survey, and that on the Ocoee map from the mouth of Slick Rock Creek, to the point where the line leaves the creek is 1,160 poles; on this witness's map, 1,120 poles. That the North Carolina contention is correct.

On cross-examination, he says he looked first for the Forked Ridge, which leads from Big Fodder Stack to Slick Rock. That the tradition was that the line ran up that ridge. That Little Fodder Stack would average higher than Hangover. That Tree No. 1 that he mentioned was about one pole west of the creek. He then re-locates the other trees again for the cross-examiner.

On page 808, he says that they had to cross the creek and re-cross it several times going up the creek, because it was so rough, and on re-examination (809), he says that the ridge running from Hangover to Cheoah is the main ridge. He then sets out the fact that he made a survey of the Peet and Gilbert grants, of which a plat is attached, which covers a large part of the property that is disputed.

J. C. M. BOGLE (Record 812).

This gentleman was with the previous witness. He states that the trees mentioned by Hale and Wilson on Hangover were not State Line trees and had no State Line marks on them and were not over thirty or forty years old. That the black oak mentioned by Hale is three quarters of a mile from the river and had no State Line marks, and the marks were not old enough. That the marks on the sourwood tree were irregular and made by a broader axe; were only forty or fifty years old and were not State Line marks. That a black oak mentioned by Hale as being 1 mile and 63 chains from the river had hacks on it fifteen or eighteen years old. That at a mile and a half he found the chestnut oak that Hale speaks of, and that it was not marked, just hacked, and another that they thought was marked for a North Carolina corner. That the marks on the North Carolina line as he and Hayes ran it, were very old, and that he was with Hayes from the mouth of the creek to Tree 26, and he corroborates Hayes as to the marks.

On page 817, he speaks of the Ocoee District map, which was made in 1837, and shows a line corresponding with the line up Slick Rock Creek. That in order to cross the river at 65 miles, you would have to go to Slick Rock Creek.

On 824, he depicts the marks on the sourwood tree and states that the main ridge as called for by the report of the commissioners, begins at the Junction.

H. P. HYDE (Record 825)

who lives in Graham County, made a survey in 1897. He says that he ran up Slick Rock Creek five miles and 101 poles to the ridge that leads to Big Fodder Stack, and thence to the Stack and to the Junction, and that he found State Line marks all along that line; and on the point of the spur 34 poles from the point on the Slick Rock Creek found a spruce pine with marks of seventy-six years ago.

He then speaks of Exhibits Nos. 1 and 2, which are blocks taken from their survey, and that beginning at the mouth of

Slick Rock Creek extending to the top of Fodder Stack he found five or six trees marked as fore and aft trees, some of which had been blocked, and many side line trees. That he had recently surveyed along the Hangover lead, having Hale's notes with him and copies of the depositions of Hale and Wilson and Muller, and that he followed accurately the courses and distances and located his trees. That he found the black oak or red oak, about three-quarters of a mile from the river and states how it was marked; that it was not a State Line tree and explains why. He also testifies in a like manner about the sourwood and describes its marks, and says that they are not State Line marks. That he found the hickory noted by Hale as running 1 chain west of line, running from his station 114 to 115. That it was not a State Line tree. That it was a line entry tree of Entry 920 of North Carolina.

On page 829, he states that he found all Hale's trees. That he found no State line marks except possibly on one tree, but these marks he discovered were not old enough, but there was plenty of large trees on Hangover Lead.

On page 832, he states that Hale's map is incorrect in giving outlines of creek and leads out the ridge up to Fodder Stack.

On Record, page 833.

II. P. HYDE is recalled.

He says that from tree 29 to the mouth of Slick Rock is 89 chains. (It may be proper to remark that the chain these surveyors used was two poles.) That the Spruce pine mentioned near the mouth of the creek had been burned and the marks could not be discovered. That the Ocoee plat shows that the east line is Slick Rock.

This witness says that he again inspected Hale's trees, which only confirmed his former statement.

On 838, he speaks of them again and states that the marks on the black oak were made with a smaller axe than Slick Rock marks. Also on page 839, he continues about Hale's trees.

This witness states that in 1883 he surveyed North Carolina entry No. 418, for Cooper, and introduces his original

certificate of that survey. That according to Hale's map, the distance from the 61st mile tree to the river is 3 1/2 miles.

On page 843, he says that the fore and aft tree on the north side of the river is marked on both sides going towards Slick Rock Creek. That the main ridge (page 844) commences at the junction.

REUBEN CARVER (Record, 850)

testifies first as to a lease from Belding and associates, claiming under their North Carolina grant to John Debity and John Debity, Senior. This gentleman was along with Hayes and Boyle.

On page 851, he says:

"The conclusion I reached as a surveyor was that the State line ran up Slick Rock Creek and thence up the ridge and over Big Fodder Stack."

That it was not his business to keep tally on the trees, and he did not see them all, but he did see fifteen or twenty. That they searched over Hangover for State line trees and found none. He speaks specifically of the black oak and the sourwood mentioned by Hale. On page 852, he says that the ridge to Cheoah is the biggest of the Hangover Ridge. This witness was recalled (Record, 854) and says that he had made a reëxamination of the Hangover lead and Hale's trees and confirmed his former statement.

DEFENDANT'S EXPERT WITNESSES.

W. D. HALE, a Tennessee surveyor.

Hale had been a witness in the old Hebard case and in the bill of review phase of that case and has testified further in this case. His testimony in the original Hebard case by stipulation has been incorporated into this record and commences at page 1311. He says that he was employed first by Hebard, and in December, 1895, and January, February, and April, 1896, attempted to locate the State line in connection with O. W. Muller, J. K. Wilson, and two other Tennessee surveyors.

That they went about three miles north of the river where the line is undisputed, and commenced their survey there; followed the line in a southwest direction, tracing the marks to the river, and finding the line marked with two hacks above a blaze, and exhibits a map which was Exhibit "A" in that original case as a result of his survey. And it is also Exhibit "A" attached to the answer in this case.

He continues after locating the line north of the river:

"I first examined the spurs of the Hangover Ridge where they bluff off to the river, because the butt of that ridge is directly opposite the butt of the ridge on which I found the State line marks north of the river."

He was governed to a great extent by the topography. That looking southwest from the butt of the ridge north of the river on which the line is marked, he first looked for the main ridge and saw two prominent ridges, the Hangover and the Fodder Stack. He says that Hangover is decidedly the highest and most prominent. He then looked for the route to Hangover and saw a large continuous ridge reaching from the Hangover Peak to the river directly opposite where the line is marked north of the river. Next he observed the course. The Hangover and the ridge to it are a little west of south, while to reach the Fodder Stack where it strikes the river, he would have to go northwest and down the river one-half mile and from there nearly due west more than three miles. (In going these three miles he alludes to reaching the Little Fodder Stack, which appears in evidence repeatedly throughout the case.)

He says Hangover Ridge more generally follows the course of the State line north of the river. He then, page 1313, mentioned many trees, intending to say that these trees are State line trees on that ridge, and in particular mentions a black oak on the Hangover Ridge three-quarters of a mile from the river.

On page 1315, he speaks of having gone on to Slick Rock Ridge and having then descended to Stiff Knee Gap three miles and 67 chains from the river. From Stiff Knee Gap he climbed to Stiff Knee Knob $3\frac{3}{4}$ of a mile from the river ascending 800 feet in 55 chains, then descending to the Lit-

the Stack Lead, to the head of Beardon Shaft Lead, which is the continuation of the Fodder Stack Lead; then ascended to the Little Fodder Stack $4\frac{1}{2}$ miles from the river; then descended to Wild Cat Gap and other gaps and knobs to Big Stack Gap $7\frac{1}{8}$ miles from the river. That 6.78 miles from the river he found a meandering line marked with two hacks and a blaze, but found that they followed trails regardless of the tops of ridges, and found the marks to be only twenty-three years old.

About 8 miles from the river he found white oak marked with two hacks and a blaze; very old marks; and then mentions further along a chestnut oak with the same kind of marks. He then continues that there is a bend in the Tennessee River below the mouth of Slick Rock Creek, and that if the land in dispute is in Tennessee, it is in the Ocoee Land District.

On page 1321, he mentions the sourwood tree which he found at Sourwood Gap.

On cross-examination (page 1326) in answer to question 107, which directed his attention to the question as to where the Commissioners of 1821 had located the line, and his answer in his examination in chief, "On the Hangover Lead," this question was put:

"Now I ask you in view of your testimony given today on cross-examination, whether you pay any attention whatever in forming your judgment, to the lines run by you, viz: 'The Hangover Lead or the Fodder Stack Lead?'"

To which he answered:

"No. My running the line did not affect it."

"Q. 108. Repeating the first part of the first question, and in view of your testimony given on cross-examination, will you state what elements in the question asked you on direct examination, viz: No. 33, you relied upon in forming your opinion?"

"A. The Commissioners' report and the topography."

"Q. 109. If it had not been for the Commissioner's report, would the topography have been of any service to you in forming your opinion?"

"A. It decidedly would."

"Q. 110. Why?"

"A. Because it was the most natural boundary, the most prominent ridge."

On page 1331, he says the marks on the sourwood tree were very old marks, but at that time he does not mention that the tree was decayed inside, so that the age could not be determined, and on page 1333, says. "I don't know that that sourwood tree was marked as a State line tree."

He states that he has been twice back to Slick Rock Creek since he had given his deposition, and that he had blocked the sourwood and the black oak, which by the way was a red oak. On page 1336, he says that the black oak was on a spur leading up to the Hangover from about the mouth of Slick Rock Creek and on the turn in the ridge and that that turn marks an angle larger than a right angle. He does not doubt that the sourwood and the black oak were State line trees. On pages 1338 and 1339, he tells how he notes the age and then states that the heart of the sourwood had been rotted out and then begins to tell why the Ocoee District map stopped at Slick Rock Creek. As given on page 1339, this reason was that the surveyors were tired and worn out and that the ground east of the Slick Rock Creek was so steep and rough that they abandoned the survey and did not regard the creek or the limit of their survey as the State line, but regarded the ridges east of the Slick Rock Creek as the State line. He claims to have obtained this information from a Mr. Harvey, who claimed to have acted as chairman on the original survey sectionizing the Ocoee District.

On page 1339 he takes up the matter again of the marks on the trees of the so-called Slick Rock line, and claims that they are not State line marks. On page 1124 is his testimony on the bill of review in the Hebard case, and on 1125 he states that the 26th mile tree is at an undisputed point on the State line and that the 59th mile tree is also. At this time, the map of 1821 had been found and he had possession of it and testifies about it. On page 1126 he says it is not possible to get accurate angles from the 1821 map. Inasmuch as one hundredth of an inch on that map represents a distance of 132 feet; this is not strange. That they can only go approx-

imate courses and distances. He commenced at the 59th mile tree with the map of 1821 and tried to run the line by it and got into North Carolina and then into Tennessee backwards and forwards, at one time a mile away from the line. That the map was no aid, but rather a hindrance. That it was not possible to locate the line up Slick Rock Creek with this map. That crossing the river at right angles as the map indicates, you would cross one-half mile east of Slick Rock, and taking the bearings you would be crossing and recrossing the ridges and foothills, and not be on Slick Rock Creek and except in one or two places you would not get closer than one-quarter of a mile to Slick Rock. That the map shows that the commissioners crossed at some stream. That it must have been Cheoah River.

On page 1127, he says the map is only a sketch map and that they have sketched the Cheoah River and called it a creek.

On 1128 he explains why he thinks it is Cheoah. He says that the track of the Commissioners of the marked trees show that they struck the river fully a half mile east of Slick Rock Creek. That Cheoah River is the first stream of any size east of the line, and is the stream that would naturally show on the east side of the line. That the description in the Cession Act of the State line from the Tennessee River to the main ridge would naturally take the Commissioners from the river direct from the point at which they struck it and crossed it, up the ridge, that is east of Slick Rock Creek and west of Cheoah River. He then describes the spur to Cheoah north of the river and states that it is the main ridge for some distance, and that there (is) a ridge from Hangover to the mouth of Cheoah which leaves the Hangover about at Sourwood Gap, one mile from the river.

The first of these spurs that he speaks of is north of the river; the second one south of the river, and he says the two spurs, one on the north side and one on the south side, would be more convenient for strangers to follow trying to cross the river and reach the ridge on the south side.

On 1129, he speaks of the Lester Ridge on the north side leading off toward the mouth of Slick Rock Creek. That the

shading on the map of 1821 would indicate that the slope of the ridge is on the side where the shading is, and that they were on a ridge. South of the river it would indicate after passing a certain distance from the river, that they were on the top of a ridge.

On page 1130, he gives the angles, some five in number, of the map of 1821, and goes on to state that no ridge would fit the map and that none near the mouth of Slick Rock Creek would fit it. That it does not run in the right direction. That Burns' map, Exhibit "D," shows the line north of the river correctly. That the map of 1821 does not show it line following the creek up to a spur, but does show that about a mile and a half from the river they were on some ridge. No surveyor could take that map and locate any ridge they were following. It is so inaccurate; the scale is so small, and there are no names for any mountains and streams and the witness would not know how to follow that map, even where the line is undisputed, as it is misleading.

On 1132, he says that the general southwest course of the map is approximately correct, and as a sketch map to show that they followed the crest of a ridge and crossed streams, it is correct; but, as for showing where they followed the crest of the ridge or crossed streams, the map is not worth the paper it is written on. And further, that it does not show correctly the ridges around Tellico.

On cross-examination (Record, 1133) he says: "I took each course separately from the map. For twelve miles south of the river I took each particular course, not merely general bearings."

The map of 1821 for seven miles southwest of the river is south 44 1/2 degrees west. The next three miles is south 20 degrees east. That from the river to Hangover is south 8 degrees west and from there to the Junction is south 60 degrees west. That he is not sure whether he used on his surveys a compass or a transit.

On 1136, he says the map of 1821 indicates that they went directly across the river and at a distance of two miles they reached a ridge, and it is hard to tell from it whether they were on a stream or in its vicinity only. That it is very

mountainous in the vicinity of both Slick Rock Creek and Cheoah River. That for the first two miles it is hard to tell whether they were following a mountain or going up a stream, and that there is no possible way to locate the line except over Hangover. That on his map Hangover and Big Fodder Stack ranges are indicated and the lines of etching represent 100 feet. That the stream on the map indicates from its trend that they must have sketched the stream on the left and that the map is utterly worthless. That you can not take the map and scale the courses and distances and follow the marked line, and that as an inevitable result they must have gone over Hangover. The map and report of the Commissioners considered together indicates that.

On 1142, he says that no stream comes in opposite tree 29. That Slick Rock is to the right and Cheoah to the left. That Slick Rock Creek runs northeast and Cheoah northwest.

On Record, 1143, he is submitted to further examination, in this particular case, and says that since testifying he in September, 1910, made a further examination of the line from the 59th mile tree with one McNab and John L. Williams. That at that time he only examined north of the river. And in the winter of 1909 and 1910, he was there with Muller and John L. Williams. He spent ten days going from the 59th mile tree to Jenks Knob, all of which confirmed his opinion.

Facing page 1144 is his map, Exhibit "1," of the line from the 59th mile tree to Jenks Knob. That it points out the line where undisputed and states that he took a portion of the Slick Rock survey from Hoyt's survey. That he surveyed the ridge that runs to Slick Rock from the Hangover and the ridge to Cheoah is just sketched in. That he surveyed one mile of the Cheoah River. That along the McClelland survey he found State line marks.

On page 1149, he speaks of tree No. 30, mentioned by Burns and Gannet. That he had inspected that tree and blocked it and that it had two hacks above a blaze on the west side and the same on the east side, fifty-seven or fifty-eight years old, and that Exhibit No. 2 is the block he took

out. That he only cut out the blaze and destroyed the hacks and left part of the block on the ground.

On 1152 he says that on Burns' block taken from the other side of this tree, the blaze is only fifty-seven or fifty-eight years old. That it is often difficult to tell the age of marks. That marks may look fifteen or twenty years old and may be seventy or eighty. On 1155 he speaks of Tennessee grants to Parsons and Chambers made in 1850 and 1852, one line which runs by tree 30. He then gives the McCroskey grant, which covers the line in dispute in Graham County, and to Griffiths and Morton and the Ocoee Land District plat, and the records of the cases of Wetmore v. Styles and Stephen v. Lovingood are Exhibits 7 and 8 of this witness's testimony here introduced.

On 1161 he says that the main ridge is around Tellico. On 1162 he gives the altitude of the mountains at different places on the State Ridge and some of the peaks on the Hangover. That the State Ridge is the highest and most prominent for about one mile, but that it does not reach Tellico River as a ridge.

He then describes the Tellico Country and the 86th-mile tree and says (page 1,167) that he found no marks from there to Jenks Ridge. That Exhibit 1 shows the South Fork of Tellico.

The Tennessee Act of 1844 is then alluded to, and on page 1,168 Cain Creek. On page 1,171 he says the map of 1821 from the 101-mile tree to Hiawassee River is 26 or 28 poles longer than the calls of the Commissioners. That 101st-mile tree is fixed and that the call from there is a south course for two miles and 220 poles, but it measures 2 miles 280 poles. At page 1,172 he says the map of 1821 shows a line around the Tellico River, but removing the etching and taking the line only on the map of 1821, it would conform to neither contention. On 1173 that taking the Cession Act of 1789, the Code of Tennessee and the report of the Commissioners, he would have to follow the course of the ridge and the water-shed around Tellico from Hangover. That the water-shed ridge is the main ridge. It keeps continuous elevations but has some low knobs and deep gaps, but is the only

ridge from the Tennessee River south that complies with the requirements. On 1174 he says the map of 1821 shows that they followed the crest of a ridge and that the line appears to cross 60 poles below the junction of the creek with the river and there seems to be a ridge there.

On 1,175 it would show that at two miles they appeared to be on the crest of a ridge, and on 1,176 he explains that the altitudes on his map are comparative. On 1,177 that the stream marked "Creek," from the length of the stream and the general trend of the stream and ridges, he can only think was intended for Cheoah.

On 1,177 he says that the headwaters of Tellico appear 80 poles west of the line on the map of 1821. On 1,178 he states that nearly all of his surveying was done in 1896, but the State Ridge line in 1899. That the Tennessee contention is right in his opinion. That between the Junction and Laurel Top the line is undisputed. That going northeast Fodder Stack drops down about three hundred feet. You would not know when you reached it. On page 1180, on cross-examination, he says the line around Tellico is three or four miles too long. That it is five miles from Jenks Knob to County Corners by the State Ridge and 11 1-2 by Tellico. That from the calls of the Commissioners' report he does not know how he would have run the line. That leaving out the words "extreme height" and confining it to distance that he would come over the State Ridge. That according to the report, the 101st-mile tree would be 106.85 miles around Tellico, and by actual measurement from the Catalouchee Turnpike to the 101st-mile is 100.5 miles, and that there are no marked trees on the line around Tellico. On page 1,183 that Grassy Knob Ridge around Tellico breaks off from the State Ridge at nearly a right angle and is nearly a right angle to Jenks Knob. That he never saw any map that shows the line around Tellico, and only judges because it should follow the crest of the ridge. That Grassy Knob is on the State Ridge.

On 1,185 he says "the only reason I say that the line goes around Tellico is that the Commissioners say they followed the main ridge," although he admits that the one is a ridge and that the other is a chain of mountains with big peaks

and low valleys, and adds that you would naturally follow the State Ridge for a mile or two; that the general trend of that ridge is southwest and that the southwest course is not intended to record every crook and curve in the mountain. Some of those courses would be in the opposite direction.

On page 1,187 he says as a whole you do not travel southwest to get to points along the line as he surveyed it. Coming back to the Slick Rock district survey, made in 1896, he says he took part of it from Hyde's survey, about three and a half miles. That he got Hyde's map from Seymour. That he commenced at the 59th-mile tree, marked 59 in figures and M., 5 1-2 miles from the river, or exactly 5.63 miles. That the 65th mile would end 37-100 of a mile south of the river. That the river to Hangover is south 8 deg. west, to Junction south 60 deg. west.

On 1,192 he says he measured horizontally. He put no elevations on the spur to Slick Rock Creek. On 1,173 he says that the trends of the 1821 map and his map agree at undisputed points. That the 64th-mile tree is 33-100 of a mile north of the river. That his line crosses the river south 44 1-4 deg. west and that the straight line on the 1821 map from there is about south 80 deg. west and that the line approaches the river from the 59th-mile tree at south 45 deg. west. That one mile back it is south 30 deg. west. Between the 62d and the 63d mile, south 82 1-2 deg. west. But the general trend is south 45 deg. west.

On 1,195 and 1,196, speaking of tree 30, he says he knows of no grants as old as 1821 in that locality, and from tree 30 to Slick Rock Creek there are no old marked trees. That on tree 30 the hacks slant and the blaze is perpendicular and the marks on that tree were distinctly State line marks. On 1,197 he says that the State line on the 1821 map strikes 60 poles west of the mouth of the river. That on the north side there is a spur which leads off from the Smoky Mountains to Cheoah, and it is the most prominent spur. That there are no State line marks on it. That tree No. 30 is ten or twelve feet from the river. That the mouth of Cheoah is a mile and a quarter from tree 29 south 45 deg. east. That there is also a ridge on the south side from Hangover to Cheoah and

from a point about two miles from the river. That it would be absurd to go to Cheoah. That the line along Hangover is 8.63 miles to the Junction and 7.72 miles to County Corners. To Jenks Knob 5.28 miles. That to the Junction by Slick Rock is 11.48 or 11.21 miles. That tree 29 is about 100 feet from the river and 1.16 miles from Cheoah.

On 1,201 he corrects his mistake in the distances; that the distance up Hangover to the Junction is 8.63 miles and from County Corners 7.22 miles, and says that the aggregate should be 15.85 miles instead of 16.35 as he had called it. That from the Tennessee River to Laurel Top is 14.93 miles; to Hog Jaw Gap 6-100 of a mile; to Jenks Knob 11.54 miles and to Unaka Turnpike 5 miles. To Hiawassee 2.87 miles; in all 44.22 miles. That Slick Rock Creek is on the right and Cheoah on the left.

On page 1,202 he says that Cheoah is correctly shown on Burns' map. That it runs southeast nearly at right angles to Slick Rock. That Cheoah runs away from the State line. That when the commissioners went from Hangover, they could see Cheoah, but that it was getting further away all the time. That from a point 63-100 of a mile north of the river, a line south 80 deg. west would strike 30 poles from the river.

On 1,205 he states that the map of 1821 shows the line for 7 miles south of the river running at an angle of south 44 1-4 deg. west, and the next three miles south 20 deg. east, which would land you at the Junction.

On 1,206 he mentions parts of the line not surveyed by him and speaks of certain portions of his map being sketched. That he did not pretend on his map to show all the topographical features. That some of the ridges were omitted and some immaterial ones were only sketched. That there is no stream there opposite tree 29; there is a bluff there one-quarter of a mile each way. That there are three forks of Tellico and the 1821 map shows only two. That State line trees are marked on both sides.

On 1,209 he says there were only two blocks produced by him in the Hebard case. That one was so rotten that the age could not be counted. That he had never heard of the line

north of the river being remarked in 1853. That side lines are only marked on one side.

On redirect examination, page 1,210, he again speaks of tree No. 30. That in speaking of 101 1-2 miles to the 101st-mile tree, he takes the 65 miles to the Tennessee River. From the river to the 101st mile is 35.5 by the State Ridge, running over Hangover. That it is more by running up Slick Rock. That there (are) no State line trees around the head of Tellico.

On 1,212 he says eliminating the age, and taking the line alone, it would not go around Tellico, and that Slick Rock Creek and Little and Big Fodder Stack ranges are only sketched in his map.

On 1,216, that from the south bank of the river to the Junction, by his notes, it is 8.46 miles, and to County Corners 7.73 miles. That there are 66 mile circles north of the river; the first mile circle north of the river is 2,392 feet from the river. That the width of the river on the map of 1821 is 2,105 feet. In fact it is only 568 feet. That the map of 1821 shows the mile circles south of the river 1,118 feet and the first circle north 3,510 feet.

On 1,218 he gives the Peck Grant in Tennessee, and on 1,219 says that map of 1821 cannot follow any one ridge or stream, and that it is not worth the paper it is written on. That the south line of that map to the mouth of Slick Rock is one mile long. On 1,221 he says he spent fifty-eight days surveying the whole line, and gives the difference in actual survey between certain lines north of the river being in excess of what the 1821 map shows. That the map of 1821 shows a creek turning away from the State line at about the same angle as Cheoah, and therefore it cannot be Slick Rock Creek.

On 1,226 he says that in the 66 mile circles north of the river the 39th and 40th miles are meant for the same. That the map of 1821 is a sketch map. That the witness did not have the North Carolina Code nor the Commissioners' report in making his survey, and that he did not, in making that survey, recognize three hacks as State line marks at all. That the map of the Ocoee Land District is only a sketch map and very inaccurate.

On record page 1,622, this witness is again examined with the Davenport notes, and on 1,623 describes how he tested the notes; also on 1,624. He says he allowed five degrees variation, but in making this test he used the compass. That he never went to the maple on Hiawassee, but it was pointed out to him from across the river, and he has no doubt it is the same tree the Commissioners marked.

On page 1,626 he continues the comparison. He says in looking down these lines on Burns' Exhibit "D," in answer to the question:

Q. "Is that a correct, or rather an accurate representation of your running of that line as compared with the line laid down there on that map, showing the North Carolina contention according to the scale of that map?" He answered: A. "No it is not. There is either a little discrepancy in the surveying by Mr. Burns and ourselves, or in the plotting by Mr. Burns and ourselves." "At one point this line very nearly touches the creek."

Q. "What line do you mean?" A. "The red line running from the 59th mile tree southwesterly very nearly touching the creek is closer to the creek in fact than we ever got in the survey, so that the whole line is a little bit east from where it was actually run."

In reference to the location of the head of Beaver Dam Creek, he says it was located by Williams too near to the Jenks Knob, probably a quarter of an inch on the scale of that map. That the south 75 deg. west on the map of 1821, according to the notes, strikes 135 poles west of Slick Rock Creek, and on 1,632 he continues his comparison of the field notes of Davenport with Burns' survey and states that the pine stump at the mouth of Slick Rock was in reality an oak stump, and says something in that page about being carried 16 miles into Georgia.

On page 1,633 he says the blazes on tree 30 are eighty-seven years old, but there are two blazes, and on 1,634 says that the map of 1821 could not have been made from the Davenport notes. That he has not changed his opinion. That the commissioners might have run up Slick Rock Creek but only tentatively, and then speaks of the bluff opposite tree 29.

On 1,635 he says, "I believe the Commissioners ran down the State Ridge and crossed the Tellico, but abandoned that line." On cross-examination, page 1,638 he stated that his copy of the Davenport notes corresponded with the Williams copy. That they followed the courses and distances exclusively, and on 1,640, that they always measured the straight line distances. That in going from tree 29 to Hangover, you pass no creek, but the map of 1821 shows a creek and the report shows that the commissioners abandoned the Slick Rock line. On 1,641 that he thinks they filed that map as a sketch map of the country and that they did not expect anybody to follow it, and that the main ridge rather starts at Cheoah.

The next witness for the defendant is

JOHN L. WILLIAMS (Record, 1,403),

a surveyor of Polk County, Tennessee. After giving his experience in stating that for a little more than eight years he was county surveyor of Polk County, he was first asked if he had examined the State line for some 2 1-2 miles along the Hiawassee River and south of that river, and having answered in the affirmative, he was asked about a certain course and certain maple tree marked "W. D. R. A." on the south bank of the Hiawassee River. He answered that that tree is still there and that about six years ago he could see the W. D. on it. That in 1909 he examined the State line from the 59th-mile tree to Jenks Knob, having been employed by the Attorney General of the State of Tennessee. That he was familiar with the Cession Act, the Code of Tennessee, the report of the Commissioners and the map of 1821.

That Hale and Muller were with him and that they used a compass. That he put in eleven days on the work and three days more in 1910. That he ran the line from Laurel Top by McDaniel Bald to Jenks Knob and also by the State Ridge.

That from the 59th-mile tree to the river is 5.51 miles. On page 1,408 he details what he did in starting this survey, and among other things, sighted back to Parsons Bald and then turned his instrument and found that Fodder Stack was

to the right and Hangover to the left of his line of sight; and on 1,409 that he then determined that the line was to the left after leaving Tennessee River. That his first impression was that the line would more nearly fit Hangover, and arose from the fact that his line of sight was to the right of Hangover and to the left of Fodder Stack, and he thereupon decided that Hangover was the true line because the map seemed to show that the line was on a ridge and that it could not fit any other ridge. That he thought that ridge parallel to Cheoah.

Hale pointed out to him the points claimed by North Carolina on their line and the points claimed by Tennessee, and he was told that North Carolina claimed that the line ran up Slick Rock Creek for some five miles, and Hale pointed out the spur running down from Fodder Stack to that point on the creek. That Hale also pointed out Little Slick Rock and several other notable objects on the south side of the river. That he stayed at that point looking for quite a while.

The next day he crossed the Tennessee River and started from Hangover Ridge and went to the junction and then down the Fodder Stack Ridge as far as Glenn Gap. That while going from the ridge leading to Hangover, he kept up his observations and could not see why, if the commissioners went up Slick Rock Creek for five miles, they should show only $1\frac{1}{2}$ miles of the creek and omitted the Little Slick Rock Creek. That would show they were on a ridge from about two miles from the river, but that the abrupt turn six or seven miles south of the river seemed to show the contrary, and he had studied that a good deal. That the map does not conform to a line five miles up the creek, and that Hangover was the only ridge he could construe as the main ridge. That from the north side it seems a much higher ridge, and thereupon he selected it as the nearest main ridge to tree 29.

That on the north side of the river he found tree marks 88 and 58 and 30, and some only fourteen to sixteen years of age, and on 1,413 he says the line north of the river has been evidently marked more than once.

On page 1,414 he says to take the shape and alignment

alone of the line from the map of 1821, it would not conform to either line, but would more nearly conform to the Slick Rock line, but for the shape of the line it conforms more nearly to the Hangover line, that is taking the topography shown on the map and everything else except the shape of the line, it conforms more nearly to the Hangover line. That the map indicates that there was a ridge to the right of where they went up, but that he applies it to the ridge from Hangover to the mouth of Slick Rock Creek.

On page 1,415 he says that at the end of two miles the 1821 map shows they were on a ridge and not running five miles up a creek, and he then goes into the question of the general trend away from the creek as it is depicted on the 1821 map. On 1,417 he says if he were running up a creek that he would not note the creek. On 1,418 he still compares the creek as shown on the map of 1821 with the line as claimed. That from Hayo to Cheoah the nearest point is 4 1-2 miles. That he has not been up Slick Rock Creek. That according to Burns' map Exhibit "D," Hangover is about three-quarters of a mile east of the head of the left prong of Slick Rock and that the angle of Slick Rock and Tennessee River more nearly represent Cheoah. That the extreme south line of the map of 1821 is seven or eight degrees different from the north line, but that would make no difference in scaling angles, but states that no one can scale bearings on the 1821 map accurately.

On 1,423 he describes the variations in the magnetic compass, and speaks of the difference between the true meridian and the magnetic meridian as variable quantities. On page 1,423 he says that a surveyor could not make an actual survey from the map of 1821. That considering all things, he never came to a positive conclusion as to the true line, but could never see that the Commissioners could have done anything else than go over Hangover. That from the face of the map and the reading of the report, if he had to decide, he would locate it on Hangover, but would be open to conviction; but thinks Hangover is where they went because it is the most direct way. On page 1,424 he gives as another reason that the plat shows that they crossed the river on the same

line as they ran to the river, hence he thinks they must have gone directly across. On page 1,425 he says that in going around Tellico, Burns' survey would not comply with the Commissioners' report.

On 1,427 that the straight line to Slick Rock on the map of 1821 is south 69 deg. west. That from the 58th to the 65th mile the course is south 47 1-2 west and then states that no man in twenty-four hours can determine where that line ran. Burns crosses the river at about south 45 deg. west. That from the 59th to the 61st mile between the actual survey and the line on the map of 1821 there is a difference of 19 2-5 poles and 36 poles in three miles. From the 61st to the 62d mile 16 3-5 poles. He then explains the discrepancy again on the extreme south line.

On 1,432 he says that platting from one point to another, or measuring around the meanderings would throw the line out. Would be all out of line. That the average discrepancies on the map are 25 to 30 poles. That the course north of the 59th mile tree on the 1821 map shows a straight line for a mile. He says taking the top of the mountain at the Tellico neighborhood and following the divide of the waters, it would lead you around by Beaver Dam Bald, Jenks Knob, Tipton Knob, McDaniel Bald, Cold Spring Gap and Laurel Top; that is around the headwaters of Tellico. That the wording of the commissioner's report, to the main ridge would mean that they would take the shortest line to that main ridge, and that the marks are very rapidly disappearing. On page 1,433 he says he never found any State line trees on Hangover that he was satisfied were State line trees. On 1,434 that he does not think it practicable to count the growth of the sourwood. On 1,435 he describes the lower part of the State line ridge and states that he found the 86th-mile tree, but found no State line trees between that and Jenks Knob. He says that he found some marks along the State ridge, but marks which he thought were more recent marks. That he did not search very thoroughly because Mr. Hale told him that it had been blocked so extensively that there was nothing left that resembled a mark.

On pages 1,437 and 1,438 he gives certain elevations and

states on 1,439 that it would take a week to make the 1821 map. That it would take twenty working days to survey 51 or 52 miles south of the river and that the whole line could only be accurately surveyed in thirty days.

On 1,441 he speaks of tree 30 and states what he did in connection with Hale and McNab in blocking it and what he found. That in the block they took the marks were 58 years old, but on 1,453 says that it was remarked in 1852 or 1853 and that would have obliterated the old marks, and that the old marks are hacks without any blaze, and gives certain reasons why there is no blaze there 88 or 89 years old. On page 1,446 he says the map of 1821 shows the line around Tellico.

On cross-examination, 1,447, he disclaims any knowledge as to whether he could go around Tellico and reach the marked 101st mile tree in that distance or not. That he guesses it would be further and that the report indicates that they marked the line and taking the distances alone, it indicates that they did not go around Tellico. On 1,448 he says that if the line was marked on State Ridge and if he considered the holly the 86th mile tree, and the distance by the State Ridge was 101 miles to the 101st mile tree, these would indicate the Commissioners ran up the State Ridge line and if there are no marks on the line claimed around the head of the river, that would confirm it. That he does not know whether you could reach the 93d mile tree otherwise than by State Ridge or not. That taking the shape of the line and the angles they do not indicate that the Commissioners went around Tellico. On 1,450 that the shape of the line conforms to the North Carolina contention, and that if the shorter line conformed more nearly to the measurements it would show that the Commissioners took that shorter line. And the Commissioners' report says that that plat shows the line. On 1,451 that Hangover Peak is four miles from the river and that they were eight days on the Slick Rock part of the line, but that this witness did not survey any part of the line south of the river, and in their surveying they used a compass. From Parsons Bald to Lone Pine is south 42 1-2 deg. west. That he did not find any 64th mile tree; that it is 235 2-3 poles from the Lone Pine to the river. From the

59th mile tree to the river following the meanderings of the ridge is 5.51 miles. The bearing to Hangover is south 14 1-2 west. That when he sighted southwest as he stated in the beginning, his line of sight struck Big Fodder Stack near Rock Stack, crossing the Slick Rock Creek. This point by Burns' map would be 13,500 feet from Hangover and 4,000 feet from Fodder Stack and seems to be within six or seven hundred feet of the line as claimed by North Carolina. On Hale's map the point would be half a mile from Slick Rock Creek and 2 1-2 miles from Hangover.

On 1,457 he says running southwest, if you struck any stream it would be Slick Rock and you could not reach Cheoah on that line. If you had reached the mouth of Slick Rock Creek and then went seven miles south 44 1-4 deg. west, you would very nearly strike the top of Big Fodder Stack. From there south 20 east three miles you would hit the Junction. "I don't know whether I would have shown Cheoah on a map of this kind or not." Such maps are not intended to be accurate topographical maps. The Slick Rock Creek is inaccurately located. On 1,460, that no other stream than Slick Rock comes in there. Just opposite tree 29 there is a bluff nine hundred feet high. On 1,462 he describes the looks of Hangover and states that you would look down considerably on the bluff when coming from the north; and on 1,463 gives elevations.

On 1,464 he says Cheoah is about at right angles to Slick Rock and at an angle of 60 or 63 to Hangover. That if you followed Cheoah you would be going further away from Hangover and Slick Rock all the time, and that its mouth is the nearest point. That the bluff on the other side opposite tree 29 extends from Slick Rock to the mouth of Cheoah.

On 1,465 he says the fact that I have made up my mind from observation that the Hangover was the main ridge, was one of the controlling factors in my mind in locating the line. Another was the sighting as previously described. That Slick Rock Creek is sketched inaccurately. That on the map of 1821 one-hundredth of an inch would be 132 feet, and that such minute distances could not be shown on the 1821 map. On 1,467 he says if a mistake was made in an angle and he

got off the line, if there was some object that he knew was on the line, he would correct it. That would be customary. That if Hangover is the line, following a stream for any distance would be irreconcilable with it. That he does not know of any stream for an equal distance running so near the State line, whether it is on Hangover Ridge or Slick Rock Creek, as Slick Rock Creek does. That the straight extreme south line straight to Georgia on the map of 1821 is undisputed and does not follow a ridge and crosses one or two little streams not mentioned in the report.

On 1,469 he says that taking the map of 1821 with the indication on it, that if he found a marked line up Slick Rock and the spur and from Big Fodder Stack and no marks on Hangover, that those facts would be a controlling factor and indicate that the Commissioners went up Slick Rock Creek. On 1,470 the words crossing at the 65th mile would land you on the south side of the Tennessee River. That the words "from the Tennessee River to main ridge" indicate that when you got across the Tennessee you were not on the main ridge but have to go to it. That blazes and marks generally may be imperfect.

On page 1,471 he says, "I counted 88 or 89 years on Burns' block from tree 30."

On 1,473 he speaks of the Thomas North Carolina grant. He states that the 64th mile tree from that grant seems to be 60 poles north of the river and from the 64th mile tree to the south bank of the river is 1,655 feet, which he corrects however to 1,305 feet; that is on account of the small scale of the map of 1821. He states that that distance of 3,725 feet, even upon the same scale of the map of 1821, could have been easily shown, to which the witness answers, "Yes."

Counsel on this reëxamination asks certain distances and certain questions about the width of the river, the precise object of which does not seem apparent, except that in going southwest of the river. Counsel seems to be seeking to stretch the end of the 64th mile to the black oak tree. And it is stated that according to these measurements the 65th mile tree would be 2-5 of a mile south of the river, and on 1,474, for the first time in the history of this litigation, tries to show

by this witness that there is no bluff across the river from tree 29, but a little level land in there and that the words "to main ridge," the significance of which he seems to conceive as meaning that the line crosses that little level strip, now for the first time discovered, and that the ridge itself [on 1,475] he seeks to show does not commence until you get about 3-8 of a mile south of the river.

On 1,475 he said: "My line of sight as originally mentioned, does not fit either contention, nor the line as shown by the map, the line straight to the mouth of Slick Rock Creek, which is south 69 west. That the seven miles just south of the river, if prolonged on the angle of that line would reach Citico. That for seven or eight miles from the mouth of Slick Rock Creek the line as shown on the 1821 map is south 37 west. That Burns' map and the map of 1821 do not agree and it is very difficult to pick out any point on the 1821 map and locate it on the ground, because of the smallness of the scale, because the points we know, note and show on our plats are not shown on the 1821 map.

On 1,477 he says that "If I was absolutely sure of State line marks on Slick Rock Creek, they would control me." On 1,478 he says, "The creek more nearly represents Cheoah."

The description is then read to the witness of the Cession Act and the North Carolina act confirming the report of the commissioners, and the witness says that according to that he would have gone to the mouth of Cheoah and thence up the ridge from there to the Hangover two miles back. He then gives certain courses from the 59th mile tree, and on 1,483 says he has never been able to reconcile the map of 1821 to either the Slick Rock or the Cheoah, and that neither of these could be seen from the Hangover Ridge. That he could not reconcile that plat with any stream in that neighborhood. That the Ocoee plats were often inaccurate, and that the bearings of the map of 1821 were evidently taken from the magnetic meridian.

This witness is examined again commencing on page 1,544 with reference to the Davenport field notes. He states that he made a survey according to these notes from the 59th mile

to the 72d mile and found himself on Citico, three quarters of a mile west of Fodder Stack. He also surveyed from the 101st to the 86th mile and landed three-quarters of a mile from the 86th mile tree. That he found a south line about 5 deg. west. That he also surveyed one mile back from the 59th mile according to the calls of the Davenport notes. The calls of the Davenport notes from the 86th mile to the maple at Hiawassee have been read to the witness, and the calls from the 72d to the 86th mile, and the witness states that he platted the Davenport notes on a copy of Exhibit "D" and compares the Davenport notes with the Burns survey. On 1556 he states that the end of the mile line on the Burns map to Slick Rock is 1,600 feet from the mouth of Slick Rock, and that the end of the 65th mile is 2,244 feet from the same point according to the Davenport notes nearly west, and that the Davenport notes took him to the Tennessee River, 1,617 feet from the 64th mile, so that 2,800 feet of that line would be south of the river. This copy of Exhibit "D" with the Davenport notes platted on to it faces page 1,556.

From the 59th mile tree to the Big Fodder Stack with the line as claimed by North Carolina, he took from Burns' notes. And on page 1,559, Exhibit "BB," which is the plat above mentioned, is filed. That the streams on that map are pretty accurately platted, but between places only sketched in, and states that on that map he has represented the main mountain and the lead to Hangover from the river, or the Hangover Ridge.

Defendant's Exhibit "CC" is here introduced, and attention is called on 1,562 to a mistake in the Davenport notes between the miles 71 and 72. That there are many discrepancies between the 1821 map and the Davenport notes, and he enumerates thirty-nine of them.

On 1,566 he continues the comparison, and on 1,567 states that the map itself shows the error of notes between the 71st and 72d mile. Also between the 95th and 96th miles. That the Commissioners' report differs widely from the Davenport notes. On 1,568 he says the notes do not say "running with the top of the mountain," and attention is called to the United States map.

On 1,571 he says Hale was with him on all of his surveys and worked with him. That the Davenport notes north of the river do not tally with Burns' survey. That on Burns' map the 65th mile ends 136 poles west of Slick Rock, and on 1,574 he continues to detail the discrepancies between the creek and Burns' survey, and states that according to the Davenport notes, at the end of the 70th mile they were 1 1-2 miles from where the North Carolina contention shows the line left the creek. He also shows then the running of the line at the Tellico River neighborhood, according to the Davenport notes, and states that they allowed five degrees variation. In other words, testing by the true meridian, while the magnetic was used by Davenport.

He states on 1,575 that tree 30 showed blazes back to 1823. That it was six or seven feet from the bank, and for the first time now, it is tried to be shown by this witness that sometimes there might be two growths to a year, but the witness said he had never found it so. The witness is then asked about Deever's map, Exhibit "FF" and the "GG" United States map. On 1,578 the witness is asked certain questions about McDaniel Bald and the Cheoah Path, in an effort apparently to fit Cheoah Path and the turns in Hang-over to the path and turns of the line as North Carolina claims it.

On 1,580 he speaks of the Deaver's map of 1837, and on 1,581 states that the streams are sketched in Exhibit "GG" on the government map.

The cross-examination commences at 1,582, and he states that he used the Davenport notes with five degrees variation; and on 1,583 details how he made use of such notes. On 1,584 he says he did not hunt for objects mentioned in the Davenport notes, and on 1,586 that he did not record, or even hunt for any of the trees mentioned in the notes, and that he platted and tested Burns' lines in the same way. That the 59th mile tree is a scarlet, not a red oak. That he found the Equoneetly Path. On 1,588 he says he discarded the map and path and discarded natural objects. That by the notes they call for the mouth of the creek. That he could not find the marked trees from the 59th to the 64th miles and that he

did not come to the creek with the survey. That was a departure from the calls, and that he knew exactly where each mile ended. That he knew the North Carolina contention went up Slick Rock Creek, but he did not survey it.

On 1,590 he says in a long survey like that, you cannot expect courses and distances to come out right. That it was not a natural way to test a survey and that he could not expect his comparison to come out right, and that if he were to go out there today and be shown those lines of the trees, he would say that they could not have gone along that line platted in red, or the line platted in green. And from here on he corrects many of his mistakes and the discrepancies heretofore mentioned in 1,591. He says these notes must have been the record of some survey. They could not come from the imagination. That the survey must have been made rapidly, and on 1,592 he describes the character of the country and he says, "In following these calls of the Davenport notes, I would consider it necessary to cross at the creek." On 1,593 he says that the notes indicated that the surveyor was going the general turn rather than getting every minute detail.

On 1,594 he says, "My observation upon the ground was what determined my belief, and not the notes." "I do not say that the Davenport notes cannot be made to fit the North Carolina contention. They would not show the Tennessee contention. The notes on the North Carolina contention cross the creek at its mouth. The Tennessee contention does not." That the Tennessee contention goes just in the opposite direction from what the notes indicate, and the Davenport notes more nearly fit the North Carolina contention.

On 1,595 he says that the Deever map turns to the left in the first mile, and in the North Carolina contention it turns the same way. That the Deever map in the first mile turns to the left, and in the first ten miles the North Carolina contention turns the same way. The Tennessee contention just in the opposite direction. That Deever's map is not correct as to either North Carolina or Tennessee contentions. The Deever map follows the mouth of Cheoah for 3.44 miles. That the blue line on the "GG" Exhibit from below the mouth of Cheoah to the Deaver western line is three-quarters of a

mile, but on Deaver's map is three miles. That you would have to move the line on the "GG" exhibit more than an inch.

On 1,597 he says that the 64th mile tree on Burns' map should be 3,095 feet back of the hemlock, 275 feet north of where he located it. From there to the mouth of Slick Rock would be south 89 west; leaving out the allowance of five degrees would be south 84 west 1,470 feet. That he found marked trees from the 59th mile to the river (record, 1,598), but that even on the north he found many State line trees with only fifty-eight years growth, but that nobody questioned the line along there. There were old trees there too to indicate the lines, and the 64th mile tree would be further back. That Burns shows one mile to Slick Rock. That if a survey was to be made there, they would sometimes take a single course for a mile and sometimes for half a mile. That the running and marking would have to be around and not following the course of the compass. That the marks there are sufficient to show that the marking was done around the mountain tops.

That Deaver's map was evidently just sketched in, which means put in from the surveyor's ideas, and is not very accurate and in fact may be very inaccurate. That the divergence of five degrees from the Davenport notes and the map, would be very slight with reference to the termini, and the witness is taken over the divergence again.

On 1,602 it would seem that the copies of the notes that were given to this witness were inaccurate; there are several of these discrepancies. That on pages 1,603, 1,604, 1,605, 1,606, 1,607 and 1,609 continuous explanations are made of these discrepancies and admission of errors made by the witness. On 1621 it is apparent that the man who made the map of 1821 and the man who made the Davenport notes had information of the same survey; the general outlines are alike and the courses and distances practically one set. In the main they are the same, and he says: "I think that by very careful work, the field notes could be made from the map itself, which would make another map which would very closely resemble it.

The defendant's next witness was

O. W. MULLER,

who testified in the Hebard case. This original testimony is found at page 1,368 of the record.

He was surveyor of Polk County, Tennessee, and was with Hale and Wilson on the original survey in about 1897. He says he was employed by McCroskey and Seymour to make that survey. That they crossed the river, examined all the ridges that could possibly be called a continuance of the main ridge on the north side, and all spurs leading to the prominent ridges on the south side. That they found no old State line marks on any of these near the river and that they ran their line on the most prominent ridge, running to what is called Slick Rock Gap, because it fits the description of the report of the Commissioners; that is on the Hangover Lead.

On page 1,369 he says the topography of the country determined their selection of this lead. Standing on the summit of this ridge and looking back over the ground, the continuance of the leading ridge seemed so plain that there seemed no possibility of mistaking the identity of the formation. It looks as though the river, impeded in its course, had burst through the mountain, worn down a rocky chasm, leaving the same configuration on both sides of the river; the course is southwesterly, and the general elevation is greater than the surrounding ridges. None of the other ridges look like a continuation of the ridge on the north side of the river, on which the marked State line is found.

On 1,370 he says there are many marked trees on this line and mentions the sourwood. They ran the line to Hiawassee. On 1,372 he says they found old marked trees on Slick Rock line, but the Hangover is undoubtedly the main ridge, and tells why, but the reasons given are the reasons that have been heretofore given by other witnesses.

On the Bill of Review, he testified with reference to the map of 1821, commencing record 1,268, that they could not fit the map to the territory, and then on 1,270 states what efforts they made to fit. He states that the map indicates that it crosses the river at right angles and they could not fit

the ridges. That the shading indicates that they were running on the ridge. None of these ridges would fit the map. That Cheoah River is a mile and a quarter from tree 29. On 1,273 he says that persons going through that country unfamiliar with it, would naturally take the spur down to Cheoah. That Hangover is the most prominent ridge, but that you have to go down to Cheoah to cross.

That Burns' map shows the State line on the north side correctly, but they could not locate the line on Slick Rock Creek from the map of 1821; that no line is shown on the map running up the creek for five miles. Indications are to follow the ridge.

On 1,276 he says that Cheoah runs almost parallel with the Tennessee River apparently, and that if you did not know that Cheoah was there, you could not see it. That they only went a mile north and in his opinion the Unicoy is the highest ridge. That the courses of the map of 1821 are not such as they can lay down on the mountains. The map shows that they run on mountains. That that map shows that they crossed at a water course, and it must be either Slick Rock Creek or Cheoah; and that the map does not show that they crossed a bluff. That by the map of 1821 you cannot locate the line. On page 1,288 he says he found the map of 1821 was incorrect in all its bearings and distances, and he paid no further attention to it; and this he could tell by the field notes of his own made before he saw the map of 1821.

He was again examined (record, 1,291). On 1,295 he says there were State line trees on State Ridge and that he found the holly, the 86th mile tree. That these were evidently made for State line marks, but were not on the line described by the commissioners, and therefore he could not say whether they were State line marks or not. That the State Ridge is not a defined ridge after you pass Hiawassee until you approach Jenks Knob. He found the 86th mile holly and says it looked as if it was intended to be a State line tree, but was not on the ridge that he picked out for the State line and therefore he could not recognize it as a State line tree; it was near the Tellico River. He describes the ridge around the head of Tellico, showing that it had a good

many gaps and knobs, but says that no competent surveyor could mistake the main divide. That there are no State line trees on the ridge around Tellico, but he located the State line around the head of that river, on the main ridge.

On page 1,300 he says crossing the river at 65 miles means that they crossed it directly. On page 1,304 he says that the maps and field notes of the Ocoee and Hiawassee Land Districts were hard to locate. The maps and notes were inaccurate. He says on page 1,306, "I followed a marked line when it agrees with the natural objects." That he did not consider it possible to reconcile the plat of 1821 with anything in that country. That the rivers on that are wrong. They are just sketched in.

J. E. WILSON,

now dead, was also a witness as a surveyor in the Hebard case (record, 1,345). He was a surveyor of Maryville, Tennessee, and was with Hale on his first survey. He found tree 29, and the substance of his testimony is that it was the natural supposition that the line would go straight across the river. He describes the topography as it has been already described and the trees on Hangover about as Hale describes them, and mentions trees on the Fodder Stack. He says the Hangover Lead is the main ridge, and he thinks the Commissioners ran up that line.

ONLEY WILLIAMS,

on page 971 of the record, is not a surveyor, but he was with one of the surveying parties. He says he found State line marks right smart below the mouth of the Cheoah, and thinks Hangover shows up better from the north, and from the shape of the stream marked "creek" on the 1821 map, that it must be Cheoah.

H. M. KENT, a surveyor. (Record, 1,489.)

This witness might be treated as a negligible quantity. Crisp, one of complainant's witnesses, record, 563, says of him that in May, 1910, he appeared on the ground represent-

ing the Babcock Lumber Company, and that he sighted from the north side backwards and forwards with a straight stick. That they had no instrument with them. They then went on to the south line of the river, inspected Slick Rock and Big Fodder Stack, and that they made up their minds that the line ran up Slick Rock and Big Fodder Stack, and he said he would so report.

He denies this on page 1,495 and says he was mainly looking for the main ridge, and that Hangover appeared to be higher and bigger than any other, and that he could not get it out of his head that Hangover was the main ridge, but admits that there were State line trees on the Slick Rock line. Subsequently he says (record, 1,505), that at first he thought Little Fodder Stack was the main ridge. That the map of Burns and Gannet seemed to be right in courses and distances from Knob to Knob, but on the whole (record, 1,501), the most reasonable and probable route seemed to be to cross the river at tree 29 to the top of Hangover and from there to the junction. Moreover, he says Hangover goes down gradually to the river and is very much broken.

This survey, such as it was, was made in May, 1910, and his testimony was taken January 7, 1911. He was asked (record, 1,510) what report he made, and did he report that it went over Hangover. He says: "I reported to him (Mr. Shields) what I found."

The question is repeated:

Q. "Did you report that it went over Hangover?" A. "I think I told him I thought so. I wrote my opinion." He gives no further light, but simply emphasizes his failure of memory in his answer to question 175, by saying that he must have reported in favor of Hangover because he must have reported what he found.

C. B. McNAB (record, 1,516),

is not a surveyor. His experience of tree marks was very slight. He never did any blocking. He says the marked trees are a little short in measurement.

On page 1,525 he speaks of the tree No. 30. He was impressed with the idea that Hangover was the main ridge.

That the blaze on tree 30 was only fifty-eight years old. That Burns' block shows four hacks. Nothing to indicate a blaze; only a dead spot on one of the hacks, and thinks that that would not indicate a blaze, but it might if the hacks were not there.

ANALYSIS OF THE EVIDENCE.

In considering the force of the evidence in this case, the subject matter divides itself into several important and controlling circumstances, which will be separately discussed:

(1) In the first place comes the Cession Act of 1789, whereby the State of North Carolina, by act of its General Assembly, ceded to the United States the territory, including the part in controversy and the territory out of which the State of Tennessee was formed. The act of February 6, 1796, of the State of Tennessee, being section 32 of the Declaration of Rights; the Acts of North Carolina and Tennessee, respectively of 1819 and 1820, whereby the two States appointed Commissioners to fix the dividing line from the Catalouchee Turnpike Road, southwest; the line to the Catalouchee Turnpike to the northeast, having been previously located. The Acts of November 9, 1821, passed by the State of North Carolina, and chapter 35 of the Act of 1821 passed by the State of Tennessee, confirming the acts of the Commissioners and adopting and confirming the line located by them.

(2) The acts of the Commissioners under the statutes of the two States, authorizing them to run the line, consisting of their report and the map designated throughout the record as the map of 1821, which report and map were filed at the time with each of said States at their respective capitols.

(3) The topography of the country at the localities in dispute.

(4) The surveys that were made in the interests of each party.

(5) The Davenport notes.

(6) The marked line.

(7) The prevailing tradition or traditions, with reference to the State line.

Taking up these in their order, we find that the Cession

Act describes the property ceded as being west of a line beginning on the extreme height of the Stone Mountain, at the place where the Virginia line intersects it. Running thence along the extreme height of the said mountain to the place where Watauga River breaks through it; thence a direct course to the top of the Yellow Mountain, where Brights Road crosses the same. Thence along the ridge of said mountain between the waters of Doe River and the waters of Rock Creek to the place where the road crosses the Iron Mountain. From thence along the extreme height of said mountain to where Nolichucky River runs through the same; thence to the top of the Bald Mountain. Thence along the extreme height of the said mountain to the Painted Rock on French Broad River. Thence along the highest ridge of the said mountain to the place where it is called the Great Iron or Smoky Mountain. Thence along the extreme height of the said mountain to the place where it is called Unicoy or Unaka Mountain, between the Indian towns of Cowee and Old Chota. Thence along the main ridge of the said mountain to the southern boundary of this State, to wit, the State of North Carolina.

On page 81 of the record, is the substance of the Act of North Carolina passed in the year 1819, providing for the appointment of the joint commission, and defining the duties of the commission to "settle, run and mark the boundary line between this State and the State of Tennessee, agreeably to the true intent and meaning of the Act of the General Assembly of this State, entitled 'An Act for the purpose of ceding to the United States of America certain western lands therein described.' "

In the second section of that Act, it is provided that the State will at all times hereafter ratify and confirm all and whatsoever the said commissioners, or a majority of those of each State, shall do and in touching the premises, and the same shall be binding on this State. And further in section 3, providing as follows: "And the commissioners on the part of this State shall cause an accurate plan of said boundary line to be made, specifying the courses, and distances, natural

and artificial marks thereof and return the same to the General Assembly of this State."

The substance of the Tennessee Act is contained on pages 82 and 83 of the record, and the third section of that act is in these words: "Be it enacted, That whatsoever the said commissioners or a majority of those of each State, shall do in and touching the premises, shall be binding on this State."

On the 31st day of August, A. D. 1821, the Commissioners under their individual names made their report and filed their map, making a report to each State. This report to the State of Tennessee commences on page 83 of the record. The report and map and all other papers connected with this survey that were filed at Raleigh, presumably have been destroyed by a fire which consumed the capitol there in about 1832 or 1833, and so far as we have been able to find, those particular papers are not in existence.

In making this report on page 84, the Commissioners say that, "we proceeded to ascertain, run and mark the said dividing line, as designated in the 11th article, called the Declaration of Rights of the Constitution of the State of Tennessee, and in the Act of the General Assembly of the State of North Carolina, entitled 'An Act for the purpose of ceding to the United States of America certain western lands therein described, passed in 1789; which said dividing line as run by us, begins at a stone set up on the north side of the Catalouchee Turnpike Road, marked on the west side Ten. 1821, and on the east side N. C. 1821, running thence a southwestwardly course to the Bald Rock on the summit of the Great Iron or Smoky Mountain and continuing southwestwardly on the extreme height thereof to where it strikes the Tennessee River, about 7 miles above the old Indian Town of Tallassee, crossing Porters Gap at the distance of twenty-two miles from the beginning; passing Meig's boundary line at thirty-one and a half miles; the Equonettly Path at fifty-three miles, and crossing Tennessee River at sixty-five miles from the beginning. From the Tennessee River to the main ridge and along the extreme height of the same to the place where it is called the Unicoy or Unaka Mountain, striking the old trading path leading from the Valley Towns to the Overhill Towns, near

the head of the west fork of Tellico River, and at the distance of ninety-three miles from the beginning. Thence along the extreme height of the Unicoy or Unaka Mountain to the southwest end thereof at the Unicoy or Unaka Turnpike Road, where a corner stone is set up marked Ten. on the west side and N. C. on the east side, and where a hickory tree is also marked on the south side, Ten. 101 M., and on the north side N. C. 101 M., being 101 miles from our beginning."

This seems to be the only part of the report that it is essential to quote with reference to the line itself, but the report adds, "The said dividing line run by us in its whole length is distinctly marked with two chops and a blaze on each fore and aft tree, and three chops on each side line tree, and mile marked at the end of each mile; agreeably to the plats which accompany this report, and which said plats and reports are certified by us in duplicate, one for each of said States, in the same words, marks and figures."

On page 86 of the record is contained the Act of the General Assembly of North Carolina, passed in the year 1821, confirming the boundary line as run by these commissioners, describing it exactly as it is described in the report, and adding, "The whole distinctly marked with two chops and a blaze on each fore and aft tree, and three chops on each side line tree, and mile marked at the end of each mile."

In considering these Acts, under the authority by which the Commissioners acted in locating this line, the first thing that strikes one is that at the time the line was so undefined, it was impossible to locate it by Legislative act. If it had not been, there would have hardly been any necessity of a joint commission. There must have been more or less of uncertainty as to where in fact that line was located. The very fact that a commission was appointed and that both acts provided for the case of a difference of opinion among the Commissioners, shows pretty conclusively that there was, or might arise, a ground for such difference, and secondly, that in cases of such differences, the Commissioners were to choose within the general directions and limits and fix where the true line was, and that that difference of opinion might be serious; whereupon it was provided that the majority of the Commis-

sioners of both States should settle it, and when it was settled in that way, by both acts, the States had agreed to be bound by it.

It is entirely illogical therefore to argue that these Commissioners had no discretion whatever in the matter; that they were bound to settle the line along the top of some ridge. That they could not leave the ridge even for a temporary purpose in getting to some other point; and that if there was no ridge that was appropriate directly in the line (that south-westward line) that then they must hunt one. The rigidity of such an authority would remove all idea of any discretion whatever, even though it might have been an exercise of discretion unanimously, and even something that was necessary. Yet they were bound to follow the extreme top of some ridge. That such is the effect of the acts is manifestly wrong, and much more it is manifestly wrong to claim, not only that the commissioners were rigidly confined to the extreme height of a ridge, but that it must be such ridge as in the opinion of the surveyors living in the State of Tennessee and employed by the State of Tennessee, was the ridge that they ought to have chosen. We say this last because we think it will appear that the surveyors on the part of the State of Tennessee followed the original surveyors, the chief of whom was W. D. Hale, who commenced his surveys in 1896 for use in the Hebard case, and has been with every subsequent surveyor who has undertaken to run that line on behalf of the State of Tennessee since then and has evidently dominated each surveying party that he was with, and it will be found that he openly avowed that the topography of the country determines the locality of the line in his mind, and that it was so because in his opinion certain ridges were main ridges and the ridge that the Cession Act intended the commissioners to follow, and which therefore they ought to have followed.

If the Legislatures of the respective States had any doubt about the true location of the line and of the ability of the Commissioners to locate it by the mere inspection of the topography of the locality, and if by the law authorizing the joint commission it is sought to obviate that by empowering a majority of the Commissioners to locate, settle and mark

the line, those doubts and that authorization would seem to have been justified by what has been developed by the evidence in this case.

Assuming that all of the expert witnesses are equally honest and equally capable, the difference of opinion that has arisen would indicate that there is ample ground for an honest difference as to which is the main ridge southwest of the Tennessee River and where the Commissioners ought to have located the line, and where the most natural locality of the line would be in the judgment of the Commissioners, reasonably following the requirements of the acts of the Assembly. And the agreement to ratify and confirm whatever the commissioners might do in the premises, emphasizes the fact that there was an essential discretion to a certain extent left to them and their unanimity in adopting the wording, "locating, settling and marking the line" shows that there must have been some consideration in the fitness of things, which induced them to locate it where they did, and if we can only locate that line that they did in fact run, then we have the thing that the Legislature ratified and confirmed.

This view of the situation, as foreshadowed in the laws, and the evident purpose of the appointment of the Commissioners, becomes important, because as we proceed it will be found that W. D. Hale, an expert witness for the defendant, who dominated all of the surveys that were made in its behalf, undertook to put his own interpretation upon the Cession Act and acts providing for the appointment of the Commissioners, and located the line almost entirely from the topography of the country and his own opinion as to which was the main ridge south of the river, and not so much where the Commissioners in fact did locate the line, but where in his opinion they ought to have located the line and endeavored to make everything else conform and be subservient to that opinion of his, formed at the start.

COMMISSIONERS' REPORT.

Looking to the report of the Commissioners of 1821 (record, 83 and 84), and without the aid of any plat or field notes filed with it, we learn in the first place that they assembled at the town of Newport, in the State of Tennessee, on the 16th day of July, A. D. 1821, to settle, run and mark the dividing line between the two States from the termination of the line run by McDowell, Vance & Matthews in the year 1799, to the southern boundary of the said States.

They made their report at Knoxville on the 31st day of August, 1821, so that a period of about six weeks was occupied by them in getting to and from the localities, making surveys and making the map. This survey is shown further to have commenced about sixty-five miles northeast of the Tennessee River and continued to the southern boundary line of the States of Tennessee and North Carolina, a distance of over one hundred and sixteen miles.

The evidence in the case on both sides shows that that was too short a time to make a strictly accurate survey. The time consumed in getting to the extreme northeast point of the line and back to Knoxville from the southwest part of the line must have been a week or more.

Williams, one of the defendant's principal witnesses (record, 1,439), testified that would take a week to prepare the map, and making some allowance for Sundays and days when the weather would not permit work to be done, they must have spent on the actual survey considerably less than thirty days. If the time was scant to make one survey, it must have been much more inadequate to make two surveys.

The pertinency of this observation will be apparent when we come to discuss the evidence of W. D. Hale. This witness, who is defendant's principal witness, and who dominated apparently all of the surveys made on behalf of the defendant, because he was present with the surveyors and apparently in charge of them at every survey that was made for the defendant. His first survey was made with Muller and Wilson in 1896 or 1897. As we will discover, commencing on the northeast side of the river, when he arrived in

proximity to the river, he cast his eye over the territory across the Tennessee River from where he stood and made up his mind that the Hangover Ridge was the main ridge to the southwest of the river, and that inasmuch as in his opinion the language of the Cession and other acts confined the Commissioners to the main ridge and rendered them powerless, even for short distances, to leave the crest of the ridge, no matter what consideration may have moved them, he concluded that the Commissioners had no power to go any place else and that therefore in fact they carried the line over Hangover Ridge, because they ought to have done so.

He is forced to admit, as we shall show further along substantially, that the Commissioners did make a survey up Slick Rock Creek and over the Big Fodder Stack, and below they made a survey over the State Ridge in distances of in the aggregate of fifteen miles of the most difficult parts of the line, but that they abandoned these perplexing parts now in dispute, and casting their eyes over the Hangover Ridge and over the ridge around the head of Tellico River, passing McDaniel Bald, while they actually surveyed and marked both the Slick Rock Creek part of the line and the State Ridge part of the line, nevertheless, they mentally adopted the Hangover Ridge and the ridge around Tellico River as the true State lines.

It is sought to be shown that in the Tellico country they were deceived because they were in a fog, and when the fog lifted, and they found their mistake, they sent some parties back to obliterate the marks on the trees that had been made, and that after obliterating some of them, they got tired of the job and were also too tired to measure and survey around the headwaters of Tellico and therefore made the mental reservation already mentioned. But of this partial obliteration and of the fact that their report was accompanied by any such mental reservation, there is not one item of evidence.

The same claim practically is made with reference to the fixing of the eastern boundary line of the Ocoee Land District, which is fixed according to the map of that district at the Slick Rock Creek. The excuse made for not going further was that the country was rough, wild and uninhabited

and they were also too tired to measure around and survey the Hangover Ridge, but that, they just made up their minds, it was the dividing line. In other words, in each case the Commissioners in the one case and the Ocoee Land District Commissioners in the other case, instead of marking the line as it was intended to be located, fixed it in their minds, but made reports and plats diametrically opposed to these secret meetings of their minds.

Referring to the written report, the commissioners say that they proceeded to ascertain, run and mark the said dividing line, which they said begins at a stone set up on the north side of the Catalouchee Turnpike Road and runs thence a southwestwardly course and continues southwestwardly to where it strikes the Tennessee River, crossing Porters Gap at the distance of twenty-two miles from the beginning; Meig's boundary line at thirty-one and a half miles; the Equonettly path at fifty-three miles, and crossing Tennessee River at sixty-five miles from the beginning. From the Tennessee River to the main ridge and along the extreme height of the same to the place where it is called Unicoy or Unaka Mountain, striking the old trading path leading from the Valley Towns to the Overhill Towns, near the head of the west fork of the Tellico River and at the distance of ninety-three miles from the beginning. Thence along the extreme height of the Unicoy or Unaka Mountain to the southwest end thereof at the Unicoy or Unaka Turnpike Road where a corner stone is set up, being 101 miles from the beginning; thence south two miles and a fraction to a spruce pine on the north bank of the Hiawassee River below the mouth of Cane Creek, etc.

Further along they say "the said dividing line run by us in its whole length is distinctly marked with two chops and a blaze on each fore and aft tree and three chops on each side line tree, and mile marked at the end of each mile, agreeably to the plats which accompany this report, and which plats and reports are certified by us in duplicate," etc.

We learn further from this report that the Commissioners were apparently in the habit of noticing the gaps and paths and the more prominent streams that had any names.

In this connection we may remark that according to the testimony, on the northeast side of the river there are streams in close proximity to the undisputed State line which are not mentioned, and if the line as is claimed goes over the Hangover Ridge, there are three deep gaps, to wit, Big Fat Gap, Sourwood Gap and the Slick Rock Gap, which are not mentioned, and two peaks, the Hangover Peak and the Hayo Peak on the line as claimed by the State of Tennessee, between the Tennessee River and the junction of Hangover Ridge and Big Fodder Stack, which peaks are, with the exception of Huckleberry Knob, which is not on the State line as claimed by either party, the very highest peaks in that section of the country which are not mentioned. So then it is quite impossible to surmise what rule the Commissioners adopted in mentioning natural objects, and it is wrong to argue that if the Commissioners located the line at a certain place, they would have mentioned this, that or the other natural object which we know to exist, for we are utterly ignorant as to what considerations moved them in determining the importance, or non-importance, of mentioning a land mark or monument; and it would be quite consistent to find, especially where some stream had no name, that they had simply called it a creek, or omitted entirely to mention it. For instance, the two peaks mentioned, Hangover and Hayo, were peaks that would stand prominent for all time, and yet, according to the claim of the defendant, the line went right over those two peaks and past the three very deep gaps and not a word is said about any one of them.

There are two portions of this report that we should like to have the Court bear in mind. One is with reference to crossing the Tennessee River and from thence to the main ridge. These words would indicate that immediately after crossing the Tennessee River, they were not on the main ridge, but that they had to go to the main ridge and that that main ridge was a more or less distance (of course we know not exactly how much) from the river, and the pertinency of this will be apparent when we come to show that in the opinion of many competent expert witnesses, not only as to the meaning of that language in surveying parlance, but that on the ground itself,

the main ridge commences where the spurs, which are many in number, leading off to the river, going northeast, meet, to wit, at the point called the junction; and it will be quite apparent that the ridges which lead from that point toward the Tennessee River, are as numerous almost as the fingers on a hand, and may be likened to such fingers, and that if it is assumed to designate anything from that point to the river as a main ridge, or the main ridge, there would be a very great difference of opinion.

Some very competent witnesses claim that the Big and Little Fodder Stack form the main ridge, because they have a greater average bulk and altitude. Others claim that the ridge going northeast leading off toward the right towards the Cheoah River and striking that river, is the main ridge, and it seems to be admitted that it does have a greater bulk and average altitude than that ridge which is called the Hangover Ridge.

Some witnesses say, with reference to the Hangover Ridge itself, that for two or three or four miles southwest of the river, it is not capable of being called a main ridge, because from a short distance northeast of the Hangover Peak it begins to drop pretty rapidly and drops gradually until it gets to the river, and for the first few miles it is very much broken by gaps.

The next language that we want to call to the particular attention of the Court is that part of the Commissioners' report which speaks of their proceeding to ascertain, run and mark the said dividing line, and in the latter part of the report where they say "the said dividing line, run by us in its whole length is distinctly marked." So that what we have to hunt for is a marked line, and if we can find that marked line, we have to a very large extent solved the difficulty.

It is not saying too much in this case to say that we are hunting for the line that the Commissioners actually ran and which they set out in their report and the map, and which is the line which was confirmed by the legislatures of the respective states, and it does not answer to look over the country at this day and to pick out where the Commissioners ought to have run the line, and assume that they

had no authority to do otherwise and that they actually did run that line so picked out, in the face of abundant and convincing proof to the contrary. If it were otherwise, then this Court would be called upon, not to find and relocate what was actually once located, but at this late date, to make a new location where Mr. Hale and his assistants are of opinion that the line ought to be. With due respect, there is no such question before the Court in this case. We are trying to find a line that has already been located, settled and marked, and with that object in view, we will examine the evidence and see whether there is sufficient to enable the Court to decide that issue.

TOPOGRAPHY.

Of course, when the Commissioners commenced their survey, they started at a point about sixty-five miles northeast of the Tennessee River, but so far as the looks of the country in that disputed locality are concerned, it only became apparent to them after they got beyond the 59th mile tree, which is in the neighborhood of six miles from the river, and is the undisputed point at which the expert witnesses commenced their surveys for the purpose of this case and the previous litigation between private land claimants.

In going down the crest of the Smoky Mountain, the Commissioners were going in a southwestwardly direction. They say so in their report, and the trend of the crest is according to that course. It is true that there is not a uniformity of course in all of the parts of this line, but for a distance northeast of where the 64th mile tree must have been, they are going on a course of about south 45 degrees west. The 59th mile tree is plainly marked with the figures 59 and M., indicating that the Commissioners report that they marked the end of each mile, is a description of what they actually did.

In going down the crest of the Smoky Mountain, when they get to a point where they have a clear view of the Tennessee River and the country on the southwest of it and approaching it in a southwestwardly course at the angle above

mentioned, they are looking straight at the Fodder Stack Ridge. When they got to the point where the 64th mile tree would be, about half a mile from the Tennessee River, the map in the case will show that they drew a straight line from that point to the mouth of a creek, which they do not name, but which at the angle of South 75 degrees West could be no other than the Slick Rock Creek, for there is no other stream comes in at that point, nor anywhere near it. In approaching the Tennessee River, however, they marked a tree on a more direct course to the river mentioned as tree No. 29, a hemlock, and then marked other trees, down the North bank of the Tennessee River and crossed to the mouth of Slick Rock Creek.

In approaching the river, the Slick Rock Creek is the only stream in proximity to the line on the right, at a distance of about half a mile down the river. The Cheoah River is about $1\frac{1}{4}$ to $1\frac{1}{2}$ miles to the left, and according to the witness Wilson, would not be visible in the summer time from the Hangover Ridge. The angle at which the Slick Rock Creek runs into the Tennessee River is about a right angle, whereas the Cheoah River, according to Exhibit "D" to the testimony of W. D. Burns, looks like a continuation of the Tennessee River itself, and beyond that, what is really the Tennessee River, might, according to the plat, be a branch and not the main river; and it is apparent that if the line ran to the mouth of the Cheoah River to the left and went for any distance up the stream, it would be going about at right angles to both of the lines as claimed by the contending States, and the surveyors and Commissioners would be going further away from the line as claimed by either party at every step they took. Furthermore, the Cheoah River is too large and swift a stream to be crossed and recrossed by a surveying party, and even if the angle of South 75 degrees West was a mistake, and should be South 75 deg. East, then according to the testimony of S. S. Gannet, one of complainants' witnesses, record page 499, such a line drawn to the East would not strike the mouth of Cheoah River, but would strike the dry land about a quarter of a mile away.

At a point on the same Northern part of the line there are ridges that go off from the Smoky Mountain. One of them, called the Lester Ridge, runs to the right and passes the mouth of Slick Rock Creek and the country between the end of the 64th mile and a point opposite the mouth of Slick Rock Creek on the Northeast side is very rough and practically impassable.

Another ridge goes off to the left and reaches or passes a point opposite the mouth of the Cheoah River, but on neither of these ridges passing to the right or left did any one of the surveyors find any State Line marks, with the exception of McNab, who claims to have found marks on the ridge leading to the left and striking opposite the mouth of Cheoah.

Looking from the end of the 64th mile across the river in the direction of about south 45 deg. west, according to the testimony you are looking right at the Fodder Stack Ridge. From the junction ten miles southwest of the Tennessee River there is testimony that you have to go down from 300 to 500 feet to get on to the Fodder Stack Ridge, and that ridge in approaching the river shoots off a spur or minor ridge, which extends to a point on the Slick Rock Creek about five miles from the river, but the main ridge continues sheering off further to the left and strikes the Tennessee River a mile or so below the mouth of Slick Rock Creek, and for a certain part of this distance it is called the Little Fodder Stack Ridge.

Just opposite tree 29 is a bluff rising straight from the river, about eight or nine hundred feet high, and for a distance of at least four miles, according to the testimony of the complainant's witnesses, the ascent is quite gradual, until you get into the proximity of the Hangover Peak and it is broken up by deep gaps, the principal ones of which are Big Fat Gap, Scurwood Gap and Slick Rock Gap. The two peaks called Hangover and Hayo, which are about half a mile apart, are very high, but are in the neighborhood of six miles from the river. Going over the Hangover Peak towards Tennessee River, there are two or more ridges that break off from the Hangover Ridge so called at different localities between the Hangover Peak to the river, one of

which runs from the so-called Hangover Ridge to the mouth of Slick Rock Creek. Another goes off to your right when coming in a northeast direction and strikes the Cheoah River some miles above its mouth, while from that again is another ridge that strikes almost at the mouth of the Cheoah River and seems a continuous ridge with the one heretofore mentioned as going off to the left of the 64th mile tree north of the river towards Cheoah River.

The bluff just opposite tree 29 extends along the south bank of the Tennessee River for quite a distance on either side, at least a quarter of a mile each way, and the river right there is impassable. A person desiring to cross the river right at tree 29 would find that he would have to go up as far as the mouth of Cheoah in order to make that crossing and come back.

Both Muller and Hale, witnesses for the defendant, state that strangers in the country desiring to cross the Tennessee River and eventually get on to the Hangover Ridge would naturally take the ridge on the north side leading to a point opposite the mouth of the Cheoah River, cross there and ascend the ridge which goes to the mouth of the Cheoah River on the south side and thence to the Hangover Ridge, reaching the Hangover at a point two or three miles from the river, and it seems to be agreed by the defendant's witnesses that the ridges leading up on the south side of the river to the mouth of Cheoah is really the commencement of the main ridge on that side of the river, rather than the so-called Hangover Ridge itself from a point opposite tree 29. There is a difference of opinion among the witnesses as to which is the main ridge on the south side of the river. Of course, this is not any difference between them as to what you see there, but an opinion as to which is the more bulky range, and therefore which is the main ridge.

The complainant's witnesses are of opinion from what they saw that for a distance of several miles from the Tennessee River on the south side the Fodder Stack range has greater bulk and average height, but the defendant's witnesses, basing their opinion largely on the superior altitude of the two peaks mentioned on the Hangover Ridge, think

that that is the main ridge, although they admit that the part that goes off toward the mouth of Cheoah River on the south side of the river is the main ridge from the point where it starts apparently away from the Hangover Ridge to the river going in a northeasterly direction, and if strangers would take that route, in order to reach the Hangover at some point southwest of the river and thence reach the junction, it is hard to see why the surveyors who first went there, who were strangers to the line, would not do the same thing.

Others, and among those others, Gannet, Bogle and Hyde, (Record 497, 824 and 844) are of the opinion that the main ridge mentioned in the report of the Commissioners commences at the Junction, for after you reach that point, it is practically one ridge; whereas, to the northeast of that and approaching the Tennessee River, the ridges spread out like the fingers on a hand, and that the very fact that there could be so much difference of opinion as to which is the main ridge, in which the Commissioners must have shared, led them to select the junction as the commencement of the main ridge; and that is why the Commissioners in their written report used the words "from the Tennessee River to the main ridge," rather than "from the Tennessee River along the main ridge."

The main ridge was not known as the Unaka Mountain right at the main ridge (See stipulation Record, 782) and was not known by that name until you reach a point about five miles further, or in other words, about fifteen miles from the river. Witnesses for the complainant viewing the premises thought that the most natural selection by the Commissioners, as they must have been looking directly at it, would be the Fodder Stack Range, and that the method of striking the creek and going up the creek about five miles to the ridge and thence to the Fodder Stack was the easiest and most natural way of getting to that main ridge. So that the topography at this point does throw some light on the question, but different surveyors, all equally familiar with the topography, and we assume equally honest and competent, draw different inferences, and, if the Commis-

sioners were in the same plight, and we are bound to assume honestly, took a certain course according to their best judgment, and that course as reported, mapped and marked was confirmed by the legislatures of the two States, who can complain, or who can even say that they ought to have judged for instance as Mr. Hale judges; or who can say that they did not honestly exercise the discretion, however little it might be, given to them by the Acts of the Assembly?

When you come to the lower part of the line that is in controversy, from County Corners and Laurel Top on, you find that there is apparently a continuous ridge still in a southwestward direction called the State Ridge, which is the ridge along the line run according to the contention of the complainant, and which we think quite evidently was so named because the line ran along it. This ridge for the first two miles is higher than any other ridge, and in going from it, the ridge around the waters of Tellico by McDaniel Bald where the State of Tennessee claims the line to be, you go down a distance of nearly four hundred feet and almost at right angles. In continuing down the State Ridge, you pass the holly tree plainly marked "86 M" and reach Jenks Knob at a distance of about five miles, whereas, in going around the other ridge as claimed by the defendant, the distance is about six miles further and misses the 86th mile tree; in other words, comes out at a point about a mile and a half further south than the 86th mile tree. So that, that tree could not be on or anywhere near the line as claimed by the defendant, and the Tennessee contention is in the shape of a pocket or loop, and the 101st mile tree would have to be about 106 miles. From that point to the extreme southern end of the line is undisputed.

It would further appear that if you attempted from the extreme northern limits of the survey, as made by the commissioners in 1821, to follow the divide of the waters, you would not get anywhere near the Tennessee line as claimed by either party. This only appears in the testimony of S. S. Gannet; but we believe is nowhere contradicted. So, that to follow the water-shed would lead the surveyor astray.

THE COMMISSIONERS' MAP OF 1821.

This map, at the time of the original hearings in the case of *Hebard v. The Beldings*, had not been discovered. It afterwards became the ground work of an application to file a bill of review in that case and has played an important part in this case. It has been the subject of a great deal of criticism.

Commencing with W. D. Hale, whose testimony on the bill of review in the last mentioned case has been incorporated into this record by stipulation, it is desirable to call the attention of the Court again to the fact that Hale might be called the dominant factor among the surveyors who worked for and testified for the State of Tennessee, and to reiterate that in making his survey in 1896 and 1897, after discovering the undisputed line northeast of the river, he looked over the country southwest of the river, and what induced him to make up his mind as to where the State Line ran, he was asked the question (Record 1326), from what he formed his judgment, and in answer said that his running the lines did not affect it; that he formed his judgment from the commissioners' report and the topography. And further, having been asked if without the Commissioners' report, the topography would have been of any service to him in forming his opinion, he answered that it decidedly would, and when asked for his reasons, stated that it was because it was the most natural boundary and the most prominent ridge.

In other words, taking the language of the laws and the Commissioners' report, and putting his own construction upon them and forming his own opinion as to which was the main ridge, he concluded that the Hangover Ridge in that part of the undisputed line just southwest of the Tennessee River was where the Commissioners ran the line, and his survey and the marks had little if anything to do with it.

It will be found on examining his testimony that this judgment, formed in the manner indicated, shaped every subsequent action as shown in his testimony, and we think we do not do him injustice when we say that all of his subsequent

examinations of the line and what he says about it, are made to conform to that preconceived opinion from which he was unable to get away; and while with reference to the formation of an opinion correctly by Mr. Burns with that map before him, he made up his mind that the line could not strike the Little Fodder Stack Range, Williams was asked whether in twenty-four hours a surveyor could make up his mind where that line ran southwest of the river, yet it seems to be apparent that after Mr. Hale got to the point on the undisputed line northeast of the river, from which he could look over the topography to the southwest of the river, it did not take him even that long, nor anywhere near it, to form his judgment as to where the line ran, and it is apparent also that Hale's controlling idea was not to find where the line was actually run, but to ascertain where it ought to have been run.

Mr. Hale in his surveys used a compass, and with reference to that method of surveying, especially in a rough, mountainous country, and as distinguished from the accurate results obtained by the use of the transit, we quote from Professor Gillespie's work on surveying, as revised and enlarged by Professor Staley, President of the Case School of Applied Science, published by D. Appleton & Co., of New York, in 1908, Volume 1, page 197. In discussing the transit, the author says in reference to the compass:

"It is little used in connection with the transit, which is so incomparably more accurate, except as a 'check' or rough test of the accuracy of the angles taken, which should about equal the difference of the magnetic bearings."

And on page 111 of the same volume, under a paragraph headed, "Defects of the Compass," the author says:

"The compass is deficient in both precision and correctness. The former defect arises from the indefiniteness of its mode of indicating the part of the circle to which it points. The point of the needle has considerable thickness; it cannot quite touch the divided circle; and these divisions are made only to

whole or half degrees, though a fraction of a division may be estimated or guessed at. The Vernier does not much better than this, as we shall see when explaining its use. Now, an inaccuracy of one-quarter of a degree in an angle, that is in the difference of the directions of the two lines, causes them to separate from each other $5 \frac{1}{4}$ inches at the end of 100 feet; at the end of 1,000 feet nearly $4 \frac{1}{2}$ feet, and at the end of a mile nearly 23 feet. A difference of only one-tenth of a degree, or six minutes, would produce a difference of $13\frac{1}{4}$ feet at the end of 1,000 feet; $91\frac{1}{4}$ feet at the distance of a mile. Such are the differences which may result from the want of precision in the indications of the compass.

“But a more serious defect is the want of correctness in the compass. Its not pointing exactly to the true North does not indeed, affect the correctness of the angles measured by it. But it does not point in the same or in a parallel direction during even the same day, but changes its direction between sunrise and noon nearly a quarter of a degree, which will be fully explained hereafter. The effect of such a difference we have just seen. This direction may also be gradually altered in a moment without the knowledge of the surveyor, by a piece of iron being brought near to the compass, or by some other local attraction, as will be noticed in Article 186.”

The complainant's witness, D. B. Burns, used the transit and states that a survey by such an instrument is almost absolutely accurate. When Burns and Gannet were surveying together, Gannet testifies that he used the same instrument that he used in locating the line between the states of Idaho and Washington, and used the methods that are the standard methods of the United States Government. With this information, it can be readily seen that not only an original compass survey, but that the testing of all other surveys and plats are subject to all of the inaccuracies of the compass itself.

With this map before him, his criticisms of that map and the line indicated by it, arise from the following considerations, which to his mind seem to carry conviction.

He says (Record 1126), that it is not possible to get accurate angles from the map of 1821, and that the courses and distances could only be approximated. It may be well to remark here that the scale of that map was 800 poles to the inch, and it means that 1/100 of an inch represents 132 feet.

On the same page of the record, in describing his attempt to ascertain the line by that map, he states that he crossed and re-crossed into the States of Tennessee and North Carolina and was at times entirely down off of the mountain.

As in testing the Davenport notes, as we shall hereafter show, so in testing this map he must have paid no attention to the fact that that kind of surveying, as all of our witnesses testified, is done by sighting straight lines from one natural object to another, but measuring around the meanders, and on page 1127, he states that it is not possible to locate the line up Slick Rock Creek with that map, and that the stream marked "creek" cannot possibly be Slick Rock Creek; and in his opinion that map is only a sketch map, and that they sketched the Cheoah River and called it a creek.

Whatever may be the deficiencies of this map, there is one thing that it shows cannot be the case, and that is the claim agreed that the line crossed directly from Tree 29 a short distance northeast of the river to the bluff on the southwest side of the river, and thence along the Hangover Ridge. It does fix irrevocably the fact that they crossed at some stream, and the question on page 1127 is predicated upon that showing.

Now, as shown by the map, from about the locality of the 64th mile tree there is a straight line drawn, a mile in length, as measured on the map, south 75 degrees west to the mouth of Slick Rock Creek, or a stream. In descending the line on the northeast you come down at an angle of about south 45 degrees west. Slick Rock Creek is about half mile to the right, and that line is drawn to the right, while Cheoah River is a much larger stream about a mile and a quarter to the left, and even if that straight line to the mouth of Slick Rock Creek by mistake was made south 75 degrees west, and the

commissioners meant south 75 degrees east, in one mile it would still strike a considerable distance away from the mouth of Cheoah Creek and would not even reach the Tennessee River, but would be a short distance northeast of it on dry land. Furthermore, Slick Rock Creek strikes the Tennessee River at about a right angle, whereas as shown by Exhibit "D" to the deposition of Burns, facing page 256 of the record, Cheoah River might be considered simply by looking at it, as the continuation of the Tennessee River instead of a branch, and it runs almost at right angles to the line as contended for by either State; and if the line was carried up that river, it would be getting further and further away from either contention. In addition, if the Cheoah River were intended to be the stream, no one of the subsequent courses and distances would fit it in any way, shape or form, and Williams, one of defendant's witnesses, says that in going over Hangover Ridge you could not see Cheoah, but that if you could see it, no one could fail to perceive that a line running up that river would be running almost straight into the State of North Carolina.

On the same page (1127) he speaks of that line as crossing the Tennessee at right angles and that therefore it must have crossed directly from Tree 29. This same criticism in different words is advanced by other witnesses for the defendant. For instance, it is said that that line appears to carry the State Line across the Tennessee River upon the same line that it strikes the river, and therefore it must have crossed at Tree 29. A more fallacious train of reasoning could hardly be devised.

The Tennessee River right there takes a bend to the north, or possibly northeast, for a short distance, and a line therefore might come in an absolutely contrary direction from Tree 29, cross the river, and yet cross it at right angles. It is quite supposable that a line would cross the river upon the same line at which it approached it, and yet to know where that line is located is entirely dependent upon the point where the line reaches the river; and a line might cross the Tennessee River a hundred miles away at right angles, and

yet in no way be shaped like a line running directly across from Tree 29.

On 1128 he explains why he thinks that the stream marked "creek" is Cheoah River, but further along in his testimony says that it would have been absurd to suppose that the commissioners went to Cheoah River, and although he couples it with the equal absurdity in his mind, of thinking that it went to Slick Rock Creek. But, on the last page mentioned, he describes the ridge on the north running off towards Cheoah, and also the one on the southwest leading to the mouth of Cheoah, which latter ridge he says is the main ridge on that side of the river, and states that those two spurs would to strangers seem to be the line to take and thus get to the Hangover Ridge over what he calls the main spur to the mouth of Cheoah.

On 1129 he describes the spur or ridge running to the Hangover from the mouth of the Slick Rock Creek and states that the shading on the map south of the river would indicate that the slope of the ridge was on the side where the shading is, and that they were on the top of a ridge and south of the river on the map of 1821, and that it indicates that after a distance from the river they were on the top of a ridge. This distance is elsewhere stated to be about two miles from the river.

On page 1130, in criticising this map, he proceeds to give the angles, five in number, although he has previously stated that the courses and distances could not be ascertained from that map. On the same page he says there is no ridge in the neighborhood of the mouth of Slick Rock Creek that could possibly conform to this map, and that the angles and distances of the 1821 map would not follow the ridge or crest. It seems to us that this is an admission of the case that that map, which is solemnly filed by the Commissioners as showing the line by its courses and distances, does not indicate that just south of the river the line runs on the Hangover Ridge, or any other ridge, for a distance of five miles; that it is just our contention.

Furthermore, on page 1131, that the map does not show that the line followed Slick Rock Creek for a distance of five

miles. The point about that is, and the testimony shows as a customary method, that the topography is merely sketched in and that Slick Rock Creek is inaccurately sketched on the map.

There is not a map in evidence in the case on either side that is not admitted to be a mere sketch map, so far as the general topography is concerned, and that it may be reasonably accurate, or very inaccurate, is shown by many maps.

The witness continues that about a mile and a half from the river the map shows that the commissioners were on the crest of some ridge, and that no surveyor could take that map and locate any ridge they were following; that it is so inaccurate, the scale is so small that there are no names indicated for mountains or streams, and that the witnesses would not know how to follow that map, even where the line is undisputed. That it is misleading. He says the general southwest course of the map is approximately correct and as a sketch map to show that they followed the crest of a ridge and crossed streams it is correct, but, as to showing what ridge they followed, and where they crossed streams, the map is not worth the paper it is written on. And furthermore, that it does not show accurately the ridges around Tellico.

Upon cross-examination, Record 1133, he states that in connection with Mr. Muller he took the bearings off of this map, taking each course separately, from the 59th mile tree. This is a strange admission after stating that it is impossible to get the courses and distances from that map, and on page 1135 he gives the courses and distances for seven miles south of the river to where the line of that map takes a bend to the left, as running south 44 1-4 degrees west, and for the next three miles as south 20 degrees east, which are a very close approximation to the true distances and courses according to the true meridian.

He states that from the river to Hangover on his map is south 8 degrees west, and from Hangover to the junction south 60 degrees west.

On re-examination he continues to reiterate these general objections, and concludes that there is no possible way to locate the line except over Hangover. On 1140 he states

that the shape of the stream marked "creek" would nearer fit Cheoah, and in answer to the question "Taking the calls as reported by the Commissioners and this map, and speaking from your knowledge and experience as a surveyor, where did these Commissioners locate that State Line?" he says first, "On Slick Rock Lead" and changes it to "No, on the Hangover Lead."

On 1141 he still stresses the shape of the stream and states that the map is utterly worthless, and that you cannot take the map and scale the courses and follow the actual marked line, and that the inevitable result is that they must have gone over Hangover.

If he could not follow the marked line, he must have meant that the marked line was up Slick Rock Creek. On 1142 he says no stream comes in opposite Tree 29, and that Slick Rock Creek is on the right and Cheoah on the left, and that Slick Rock Creek runs northeast for several miles and Cheoah northwest.

In connection with the location of some point on the south side of the river, which seems to have been unlocated on that map, the witness John L. Williams for the defendant, is asked whether or not there would have been any difficulty in designating such point, inasmuch as even according to the scale of that map it would only require a line of about a quarter of an inch, then to say there is difficulty in locating a point at the mouth of Slick Rock Creek by a line from the 64th mile tree, which according to the scale of the map would be $\frac{4}{10}$ of an inch, and to say that it is impossible to get the courses and distances from that map is to our minds incorrect, because with a meridian, a ruler and a protractor, any course or distance on that map could be ascertained even by an amateur, if it were visible to the naked eye, and it will be seen when we come to the testimony of the complainant's witnesses, that there is no difficulty whatever in locating the line by that map.

In the territory below around Tellico, this witness on page 1181, states that he does not know how he would run from the calls of the Commissioners' report, leaving out the words, "extreme height" and confining it to the distances, from

Laurel Top he would go by the State Ridge. On page 1187 he states that on the whole, you do not travel southwest to get to points along the line surveyed by the witness, and on page 1212 he says eliminating the etching and taking the line alone, it would not go around Tellico River, and that on his map Slick Rock Creek and Little and Big Fodder Stack were only sketched in, and on page 1227, he states that the map of 1821 is a sketch map.

On page 1634, he says that the map of 1821 could not have been made from the Davenport notes. That the commissioners might have run up Slick Rock Creek, but only tentatively. That the time of their survey was too short; and on page 1635, he says, "I believe the commissioners ran the State Line down the State Ridge, crossed the Tellico, but abandoned that line."

John L. Williams, a surveyor of Polk County, Tennessee, whose testimony begins at Record 1403, of whom I can say that I think he tried to be fair as much as his surroundings would permit it, and I feel quite sure that he was the most competent surveyor on that side of the case.

It is true that he viewed the ridges southwest of the river much as Hale did, but he says the abrupt turn six or seven miles south of the river seemed to show that they did not go over Hangover Ridge, and that he had considered that a good deal.

He states on page 1414 that to take the shape and the alignment of the line alone, the map of 1821 does not conform to either line, but more nearly to the Slick Rock Line; but that taking everything else, it more nearly conforms to the Hangover. That the etching indicates that there was a ridge to the right of where they went up, which he concludes to be Hangover or the ridge to Hangover from Slick Rock Creek, but there was also a ridge, to-wit, Little Fodder Stack, on their right as they in fact did go up.

He proceeds to compare the shape of the stream marked "creek," and states that at the end of two miles the 1821 map shows that they were on a ridge and not running five miles up the creek. On 1417 he says as a surveyor, if he were running up a creek, he would only show the creek.

That from the Hayo Peak to the Cheoah River the nearest point is 4 1-2 miles.

On page 1423 he says: "I never came to any positive conclusion as to the line at Slick Rock Creek, but could never see that they could have done anything else than go over Hangover," and reiterates that the plat shows that they crossed the river on the same line as they ran to the river, and hence that they must have gone directly across.

At the Tellico, after taking the distance from Laurel Top to Jenks Knob alone, that it indicates that the commissioners did not go around the Tellico River. On 1448, that if the line is marked on the State Ridge, and the distance to the 101st mile post was 101 miles that way, he would say that those things would indicate that the commissioners surveyed by way of the State Ridge. On page 1457, he says that running in a southwest direction, if you struck any stream at all, it would be Slick Rock Creek, and that you could not reach Cheoah on that line, and that if you reached the mouth of Slick Rock and went seven miles south $44\frac{1}{4}$ west, that you would strike the top of Big Fodder Stack, and thence three miles south 20 degrees east, that you would land at the junction and that maps of this kind (page 1458) are not intended to be accurately topographical maps, and that Slick Rock Creek is incorrectly located. On 1460 he says that no other stream than Slick Rock Creek comes in there. That the bluff across from Tree 29 is nine hundred feet high. On 1464 that Cheoah River is about at right angles to Slick Rock Creek, and at an angle of 60 to 63 degrees to Hangover, and that a line going up Cheoah would be getting further away from Hangover and Slick Rock all the time, and that its mouth is the nearest point. That the bluff on either side of the river extends from Slick Rock Creek to the mouth of Cheoah. On 1465 he says, "The fact that I had made up my mind from observation that Hangover was the main ridge, was one of the controlling factors in my mind."

On 1466 he says that the courses and distances, that is such minute distances as 132 feet to $1/100$ of an inch, could not be shown on the 1821 map; and on 1467 he says, if a mistake was made in an angle and he got off the line, but

there was some object that he knew was on the line, he would correct it. That would be customary. That if Hangover is the line, the following of a stream for any distance would be utterly irreconcilable with it, and that he knows of no stream running for an equal distance so near the State Line, whether it is on Hangover or Slick Rock Creek, as that creek does.

On 1468 he says the straight south line to the Georgia line is undisputed, but it does not follow any ridge and crosses one or two small streams not mentioned in the report nor on the map. On page 1469 he says, if the map of 1821, with the indications on it he has mentioned, and if he had found a marked line up Slick Rock and the spur to the Big Fodder Stack, those facts would be very controlling and would indicate that the commissioners went up Slick Rock Creek. As previously mentioned, that he personally made no survey at all of the river at that point, and on 1477 he says: "If I was absolutely sure of the State Line marks on the Slick Rock Creek Line, they would control me." On 1479 he says if he had been among the surveyors originally, he would have gone to the mouth of Cheoah. On 1483 that he has never been able to reconcile the map of 1821 with either Slick Rock Creek or Cheoah. On 1566 and 1567, in reference to an error in the Davenport notes between the 71st and 72nd mile, he states that the map itself corrects that error.

On 1590 he says, "I knew the North Carolina contention went up Slick Rock Creek (1589 and 1590) but I did not survey it," and that in a long survey like that you cannot expect courses and distances to come out right. That the way they tested the map and the notes was not a natural way to test a survey, and they could not expect it to come out right, and that if he were to go out there today and be shown the line and the marked trees, if they could be found, that he could say that nobody could go along the line plotted in red and green and file it as a test of the notes and map.

On page 1621 he says that it is apparent that the man who made the map of 1821 and the man who made the Davenport notes had information of the same survey and the general outlines are alike. That the courses and distances are

practically one set; in the main they are the same and he thinks that by careful work, field notes could be made from the map itself, which would make another map which would very closely resemble it.

The above are the only witnesses for the defendant whose testimony it seems necessary to consider with reference to the map of 1821. What the witness Muller says about it is only echoing the opinion of W. D. Hale, and is not nearly so complete and relates mainly to the shape of the creek and the ridges.

It must be quite evident from even a slight consideration of the testimony as quoted of Hale and Williams, that the question is not so much whether you can obtain from the map of 1821 the courses and distances and shape and apparent locality of the line, but whether you can fit the line as laid down on that map and the field notes of Davenport and the marks to some ridge which those witnesses have made up their minds is the ridge over which the Commissioners should have gone, and therefore did go, and the chain of reasoning would seem to be that a map which does not show that the line went over the Hangover Ridge, and field notes and marks which show that the line went somewhere else, must necessarily be worthless, because they have begged the question and already determined that the line went over Hangover.

The largest and most important part of the testimony with reference to the map of 1821, comes from what complainant's witnesses Burns and Gannet say about it. The testimony of D. B. Burns begins at page 226 of the record, and on page 233 he says that in making his survey he had the plat of 1821 with him. On page 242, that in the neighborhood of the Tellico country below, the State Ridge tallies with the map of 1821. On page 246, that Mr. Gannet commenced at the 59th mile tree, which is exactly 6.02 miles to the Tennessee River at the mouth of Slick Rock Creek, which he found from the use of the map of 1821 and the measurements, and that from there to the Tennessee River, as contended for by the State of Tennessee, it is only 5.47 miles, to the south side of the river, and that according to the map

of 1821, from the river to the junction is ten miles, and from the 59th mile tree to that junction 16 miles; whereas by the Tennessee contention it is only 14 miles. On page 247, he says that according to his bearing on Exhibit "D," from the 59th mile to the 65th it is south 55 degrees, 5 minutes west, but on the map of 1821 it is south 58 degrees west, and south of the river to the first short turn to the left on the map of 1821, from the 59th mile tree to Big Fodder Stack on Burns' plat is south 49 degrees, 40 minutes west, while the 1821 map shows 50 degrees 40 minutes west, and Hangover is south 29 degrees 8 minutes west. That from the south bank of the Tennessee River to Fodder Stack, according to his measurements is south 44 degrees 28 minutes west, while the map shows south 43 degrees 25 minutes west, and from the south bank of the Tennessee River to Hangover is south 9 degrees 29 minutes west. And the witness states that he could locate Big Fodder Stack on the 1821 map.

On page 248 he says Hangover does not tally with the 1821 map, it breaks to the right instead of to the left. That the Tennessee River to Big Fodder Stack is shown to be 6.67 miles, while on the Tennessee contention Hangover is 5.9 miles from the river, and by the North Carolina contention the line from Big Fodder Stack to the Junction is 3.37 miles, and by Hangover 2.59 miles; and that the 1821 map shows 3 1-3 miles. From Big Fodder Stack to Junction is south 18 degrees 12 minutes east; from the 1821 map is south 19 degrees 15 minutes east, while from Hangover to the junction is south 60 degrees west.

On record 249 he says that the North Carolina contention agrees with the 1821 map, and that the witness' map is exact with the 1821 map, and Exhibit "B" facing page 250 of the record, is a comparison of the three lines.

On page 251 he says at undisputed points the Tennessee contention agrees with the map of 1821, and at other points the trend of the line is different. That map turns to the left at about seven miles from the river, while the Tennessee contention turns to the right, and Exhibit "C" facing page 252 is a comparison of those contentions.

On page 253 he says that his plat shows 27.64 miles to the

86th mile tree, whereas, the Tennessee contention, carrying it by way of State Ridge, would be 25.56 miles from the 59th mile tree, and that by the Tennessee contention you cannot reach the 86th mile tree. And further along it is stated that it comes out a mile and a half further down than the 86th mile tree. That by his plat, from the 59th mile to Jenks Knob is 28.77 miles; by the Tennessee contention 32.82 miles, and by the map of 1821, 28.01 miles, and that the Cheoah River, for a distance of ten or twelve miles is almost at right angles to the undisputed line. That the plat shows that they followed the creek, and that opposite Tree 29 there is a bluff 700 feet high, extending half a mile up and down the river, and that there is no ridge there.

On page 259 he says that the commissioners' report agrees with the plat. On page 261 that the stream marked "creek" is sketched in wrongly, but that by the Hangover route the first stream would be the Hiawassee River, 37 or 38 miles from the Tennessee, and at the 38th mile, two circles that seem very close together are in reality intended for the same circle.

On 263 he states that the trail mentioned at the 93rd mile comes out just right by the map and that the 101st mile tree, which is an undisputed point, was also tested by comparing its bearing on his map with the bearing of the 1821 map, and they agreed, and thereupon he states what in his estimation and opinion is the true location of the line, and why Big Fodder Stack Range would be selected.

On page 270 he says that he made his survey by a transit, which is much more accurate, and on 271 that the map of 1821 must have been made by a compass, and explains on page 273 the significance of the straight line on the 1821 map from the 64th mile tree.

On 282 he explains the trail at the 96th mile, which is a continuation of the trail that strikes it in the neighborhood of the 93rd mile. That the straight line from the 64th mile tree on the map crosses the Tennessee River at an angle of 60 to 80 degrees.

On 285 he explains that surveyors in rough surveying would sight from one point to another, but in measuring

would follow the meanders. That the straight line to Slick Rock is over very rough country. He thinks that the line that the Commissioners adopted was the line they marked. He then says that it is impossible to cross at the 29th mile tree, and that the straight line from the 64th mile tree carries you very close to the mouth of Slick Rock, and is south 75 degrees 30 minutes west; while to the river, as Tennessee contends, is south 53 degrees 55 minutes west.

On page 288 he says that the error in sketching the creek would make the hachures come too early. On page 290 he says, taking the map of 1821 and starting at an undisputed point, it would not be possible to go around Tellico, nor by way of Hangover, and on that page and on 291, that only Slick Rock Creeks fits the map and report. That the report of the Commissioners mentions the west fork of Tellico, but the map does not show it. On 297 he says he first supposed the line went up Slick Rock Creek a mile and a half, and then went up Little Fodder Stack.

On page 318 he says: "I tested my survey where I crossed the Tennessee River to the top of Big Fodder Stack, and compared it with the bearings of the map of 1821," and that he was out to determine from that map whether the line went up the Little Fodder Stack or Slick Rock Creek, or over Hangover. He agrees that the straight line at the extreme southwest end of the survey, reaching the State of Georgia, is not due south, and on page 320 explains again the method of surveying by sighting various points and measuring around the meanders, and on 322 the variations of the needle.

On 327 he says that streams are only sketched on the map of 1821, and that the Tennessee River, which is only 400 feet wide, yet is shown on the map to be 3,200 feet wide, and on 332 that Slick Rock Creek is about 40 feet wide, and is shown to be 800 feet wide.

On 354 that it is a matter of opinion whether the straight line from the 64th mile tree to Slick Rock is the State Line, or whether the Commissioners adopted the line around by way of Tree 29, where they marked it.

On 358, speaking of where he commenced his survey, he says he was carried from there to the Tennessee River, and

thence to Slick Rock Creek by the map of 1821, and by the marks. That the rule in following old maps is to always go to the monuments. That it would be absurd to expect to find everything on the ground just as on the map, and that certified copies of the map of 1821 seem to differ. That the copy used by the witness Williams was not like the one he had, in regard to the ridges or the creek. That also there was a difference in the locality of the path from the valley towns; that all of the streams on that plat were exaggerated. On 361 he says that Slick Rock Creek is only sketched in and wrongly sketched; that it is exaggerated in width and length.

On 361 he describes Slick Rock Creek and states on 362 that it was the only stream on the right that you could see, and that it corresponds with Cheoah at no point. That the Cheoah for seven or eight miles is north 45 west; Slick Rock Creek for the first mile and a quarter is north 35 east. Of course that is going in a northeastwardly direction.

On 363 he says that the south line at the extreme end of the survey, although it is out seven degrees from the true meridian, is not deceiving, and in fact the line there is undisputed, and he thinks one reason why it seems so (page 364), is that the map is pasted together crooked. On the same page he says further in following the waters of Slick Rock Creek you get a curve to the junction, concave from the east, as the map shows, while in going up Hangover to the Junction you get a curve in the opposite direction, concave to the west. "My curve is on the 1821 map, and the map was a great advantage."

That there was a great variation in the general bearing from the Tennessee River to the Big Fodder Stack and from the Tennessee River to the Junction by way of Hangover, of 30 or 40 degrees, and from Big Fodder Stack to the Junction, and from the Hangover to the Junction of 40 or 50 degrees.

On page 378 he said it would be impossible to indicate every bend on the 1821 map, and that the fair way to use such a map is to follow a general course. On 379 that the Cheoah is a large stream with creeks running into it, and that in going around the headwaters of Tellico it would be

about six miles further than by the State Ridge, to reach the 101st mile tree.

The next witness is S. S. Gannet, whose testimony begins on page 408 of the record. In making his surveys, which was partly on his own account and without the assistance or presence of Mr. Burns, he states on page 413 that he had this 1821 map with him, and on page 414 that his survey tallied almost exactly with the 1821 map. That it would not tally with that map to go around the headwaters of Tellico by McDaniel Bald; that around there is twice as far as by the State Ridge. That the line as marked agrees with the 1821 map, and that obviously the other route was so far out of the way, according to the map and marks, that he did not deem it necessary to go around that way.

On page 417, speaking of going northeast, he says the 1821 map going northeast carries you from the Big Fodder Stack route to the forks of Slick Rock, and thence to the mouth of Slick Rock, and that the marks carry you over the same line.

On page 418 he says that he found Burns' work the most accurate that he had ever known in such a rough country. That the Slick Rock Creek would be the most natural way to reach Fodder Stack and the Junction, and that that would agree with the 1821 map. That the other line was entirely too far to the east or left. That across from Tree 29 is a very steep bank 800 feet high up and down the river, and that that would not be a practicable route, for it was too steep, and it was practically impossible to survey a line up and down that bluff.

On page 425 he says the Government contour map exhibit (page 406 of the record), shows the Slick Rock Creek as the line, and that the Big Fodder Stack is in a general southwest course, and then turns a little east of south to the Junction, the same as the North Carolina contention. On page 428, that by his survey, it is 6.02 miles to the river by the Burns and Gannet map, at the mouth of Slick Rock Creek; six miles, by the 1821 map to the mouth of Slick Rock Creek, but by the Tennessee contention only five and

one-half miles to the river, and he confirms what has been said about the distances to Big Fodder Stack and thence to the Junction, as stated by Burns.

On 429 he says the stream marked creek on the 1821 map can only be Slick Rock. That Cheoah is a mile and a half to the east, and could not possibly be the creek. That Slick Rock is at almost right angles to the Tennessee River; Cheoah is at an acute angle and comes from the southeast, and Slick Rock from the southwest. On page 430 that the 1821 map is a map of a line, not of the general topography. And on that page, and two subsequent pages, he states in what respect Hale's map is very inaccurate.

On page 433 he says that there is no doubt in his mind that the commissioners went up Slick Rock Creek and below along the State Ridge, crossed the Tellico and up Jenks Ridge, and that in addition to the marked trees which would show that line, that the map of 1821 shows it, and it agrees in his opinion with the route that would be naturally selected. That it is not possible to fit the commissioners' map to the Tennessee contention, and that the map so indicates at both disputed places. On 434 that he could locate objects by that plat, and its courses and distances and could locate the line with it.

On 441 he says surveyors would take a general bearing, but measure around the meanders. On 442 that going around Tellico you depart from the plat and that he tested Burns' notes from the Junction to the mouth of Slick Rock Creek. Among other ways, by the geodetic co-ordinates, and computations based thereon, which to him proved that the survey around Slick Rock was absolutely correct. On 443 that the proper interpretation of the Commissioners' map is that the line follows the creek; that the hachures are sketched in, and that it would not be possible in running a line from Virginia to Georgia to follow the water divide and make it come anywhere near Tennessee. And again he says the map of 1821 by courses, cannot go around Tellico. On 467 he reiterates that the line around Tellico could not possibly agree with the 1821 map.

On 474 he explains the divergence of the line from the

creek as shown by the 1821 map. On 478 that no map made is absolutely correct. That in following the meanders the map generalizes. That the streams are not drawn carefully. On page 483 that Brazier's map of 1833 shows the line up Slick Rock, and on 484 that the Cheoah is several miles east of the line; that the line down the State Ridge agreed very closely with the commissioners' map. On 491 he says that map only shows in a general way the summit of the mountain and some of the streams and rivers, and that it is customary to sight from one common object to another in such a survey.

On 497 he says that there is no main ridge until you reach the Junction; that the ridges spread out like fingers. On 498 that the photographic copy of the original 1821 map shows a line in the center of some shading that is the State Line, and that that line strikes exactly in the mouth of Slick Rock Creek, and that in this respect it differs from the certified copies. That the straight line on the map from the 64th mile tree lands you at the mouth of Slick Rock Creek. On 499 that looking at Cheoah you are looking southeast to the left, whereas, Slick Rock is to the right, and to reach Cheoah you would go 50 degrees east more than a mile. That if that bearing from the 64th mile tree to the Slick Rock Creek mouth is a mistake for south 75 degrees east, you would still not reach Cheoah, but it would land you on the north side of the Tennessee River about a quarter of a mile back, and that according to the courses and distances of the commissioners' map, you could not go up Cheoah, but would be getting further away all the time. On page 504 that the 86th mile tree is several hundred feet south of the Tellico River and by the Tennessee contention you would not reach it by a mile and a half; the nearest point is Jenks Knob.

On 510, that from the plat of 1821 and other information, he could see that the line could not diverge as claimed by the defendant. On page 517 and following, that the calls of the Davenport notes correspond very closely with the Commissioners' map.

Whatever other witnesses for the complainant speak of this, it might be said that these two witnesses are fuller and

more accurate, and as in the case of Hale and Williams, represent the best phase of the complainant's evidence as to the Commissioners' map, and it is not necessary to discuss the evidence of any other witnesses in connection with it, under this particular subject matter.

From the 59th mile tree, on the northeast, to a point where Burns commenced about 3 1-2 miles northeast of the river, Mr. Gannet made his own survey, and from Jenks Knob coming to the north to Laurel Top, he also made his own survey. In other parts of the route he went over it carefully and tested the survey of Mr. Burns.

If there is any disinterested witness in the case, Gannet is one. He was deputed by the United States Government, at the request of the Attorney General of the State of North Carolina, to find, if he could, this line. His experience, practical and theoretical knowledge cannot be disputed. He had no purpose to serve, except to find the correct line by the exercise of the highest skill that could be brought to bear upon the subject, with what result, of course, it remains for the Court to say; but we do not hesitate to say that our conviction is that his effort was crowned with absolute success. There is no effort on the part of either Burns or Gannet to carry out any preconceived notion from the looks of the country.

Mr. Burns went at first with the idea that the line went up Little Fodder Stack Range, and Mr. Gannet went, so far as we know, without any preconceived idea. So that we think it may be said that their efforts were directed to the ascertainment of the line as really located by the Commissioners, and therefore it did not occur to them, nor seem to them proper, to discard all of the evidence as to where the Commissioners in fact located that line, because they had an opinion that the line must be fitted to some ridge, and all information as to the fact of location be discarded.

Whatever may be the deficiencies of the map of 1821, there are some things that are settled conclusively by it. Everybody concedes that it shows that the State Line crosses the Tennessee River on a straight line from about the 64th mile tree to the mouth of a creek or stream, and that therefore it

is impossible to claim that the line crosses the Tennessee River directly from Tree 29 to the Hangover Ridge, and thence along that ridge. It also shows that the stream that it strikes is to the right, at an angle of south 75 degrees west, at a mile from the 64th mile tree, and that would conclusively show that it could not strike a stream to the left more than twice the distance away, and when a straight line south 75 degrees east would not even land at the Tennessee River, but would land inland more than a quarter of a mile away from the Cheoah River. So that, even if the course south 75 west was an error, the matter would not be mended.

In the case of the error in the Davenport notes at the 72nd mile, the map itself corrects that error, so that so far as the line upon the map is concerned, we have a right to assume that the course of that is correct. And taking the shape of the line, as the defendant's witne Williams did, at the State Ridge, where he testifies that taking that shape alone the commissioners could not have gone around the headwaters of Tellico, so, in the Slick Rock Creek region, taking the shape of the line alone with its curve to the right, concave from the east, it is impossible to conclude that it could fit the Hangover Ridge, which curves in the contrary direction and is concave from the west, and still less could you fit it to the Cheoah River, which is to the left, but runs almost at right angles to the lines as contended for by either State, and when every foot as you ascend the Cheoah River would carry you further away from the line as claimed by either party, and at a distance of five miles instead of being in the neighborhood of the headwaters of Citico, which is entirely in the State of Tennessee, you would be ten miles away.

DAVENPORT NOTES.

These field notes bear every evidence of authenticity. A copy of the notes themselves is found commencing on page 624 of the record, and contains every course and distance from the start. These notes were found in a secret drawer of an old secretary that had been owned by William Davenport, and which had continued with him and his family since the time of the survey of 1821. It is in the handwriting of

William Davenport and his wife, who was in the habit of acting very frequently for him as an amanuensis.

These notes are fully authenticated and identified, either as the original or as a duplicate of the original, by W. D. Jones (Record 605), who was a grandson of William Davenport, and by Mrs. Emma Harper Cilley (Record, 634), his granddaughter.

These notes were taken and compared with the map of 1821, and the survey of Burns, and Mr. Burns personally went over the ground with these notes.

On page 380 he describes the relative situation of Slick Rock Creek and Citico Creek, and on page 391 shows that Citico heads up next to the ridge between Big Fodder Stack and the Junction, and on the opposite side of the mountain, some prongs of it head up about at the Junction.

On page 643 of the record commences the testimony of Mr. Burns, especially upon these notes. The complainant's Exhibit "BB" (Record page 1560) shows a comparison of four lines; one run and marked by the commissioners of 1821 as shown by their plat; the second is a plat of the surveyed line made by Mr. Burns and Mr. Gannet, and the third is a plat of a surveyed line made from the Davenport field notes and commencing near the bottom of page 645 of the record and continuing to page 691, the matter is taken up in detail and identified with Burns' survey and the marks and courses and distances of the map of 1821, and it is shown that they all correspond with a good deal of accuracy.

Attention is called to a mistake in the field notes at the 72d mile, to wit, the course south 30 degrees west 80 poles, which should be east, but which Mr. Williams says the map itself corrects.

So far as Mr. Burns is concerned, he amply and in detail upholds these notes, and shows that at the crossing of the Tennessee River, the notes and the map of 1821 agree as to the straight line south 75 degrees west 320 poles; and Mr. Gannet, commencing at record, page 692, and continuing to 717, fully corroborates the testimony of Mr. Burns, and they both testify that the map of 1821 and the field notes substantially agree and they both substantially agree with the

survey of Gannet and Burns, and that they fit the North Carolina contention, and cannot in any way be made to fit the Tennessee contention or the Cheoah River theory.

On the other hand, Hale and Williams made a test of these notes and have a copy of Exhibit "BB" with that survey from the notes and the line on it in red and green. The method taken by these witnesses in trying to apply these notes is shown by the testimony of Hale, (Record 1622) and corroborated by the testimony of John L. Williams, commencing on page 1550, and the copy of Exhibit "BB" with that survey applied to it, faces page 1558 of the record.

Of course, these witnesses find a wide discrepancy, and even on the north side of the river, according to their evidence, they found themselves getting first over into the State of Tennessee and then over into the State of North Carolina, and on the south side of the river, when they got to the Junction, they found they were a mile and a half from that point over on the Citico.

In giving their testimony, especially Williams, they enumerate some thirty or forty discrepancies between the notes and the survey of Burns and in the map of 1821. We presume they used a compass and a protractor in making this comparison, and on cross-examination, however, Williams corrects a great many of his discrepancies, and in several instances acknowledges that he was entirely wrong.

Now the manner in which this comparison was made and these notes run out on the ground, was that they simply measured the lines as they conceived them to exist and discarded every natural object and every mark. On page 1,585 it is shown that they did not regard, or even hunt for any of the trees. That they found the Equonettly path, but they discarded that and the gap as well. They discarded the creek, and on page 1,589, Williams states that they could not find a mile tree so marked from the 59th to the 64th mile, and therefore paid no attention to mile trees, although the position of those is undisputed. That he did not go to the creek with the survey, and in that respect departed from the calls; and that he knew that the North Carolina contention went up that creek, but that he did not survey to it.

On page 1,590 he admits that in a long survey like this, if you discard all natural objects, you cannot expect the courses and distances to come out right. And in answer to question 104, which is this:

Q. "And it therefore would not be a fair way of running a line where the natural objects were discarded of an old survey, would it?" To which he answers: A. "No, I could not expect it to correspond with the original survey." And he says that if he went out there today and was shown the trees, he would say that nobody could follow the lines plotted in red and green.

He then says on page 1,591 that these notes must have been the record of some survey; that they could not come from the imagination. On 1,592, that in following those calls of the notes he would consider it necessary to cross at the creek, and on 1593 that the notes indicated that the survey was going the general turn rather than getting every minute detail.

This witness further states that it was his observation on the ground that affected his belief and not the Davenport notes at all, though he adds that he cannot say that the Davenport notes cannot be made to fit the North Carolina contention, but he does say that they would not show the Tennessee contention, and that the North Carolina contention and the field notes both cross a creek at its mouth, while the Tennessee contention does not, and that the Davenport notes do show that the line circles around from the right to the left, while the Tennessee contention would circle around from left to right.

On 1,595 that the Davenport notes more nearly fit the North Carolina contention. On page 1,598 he says that if a survey had been made through there and sometimes would take a single course for a mile distant, and sometimes for half a mile, that the running and marking would have had to be around and not follow the course of the compass across.

On 1,600 he explains that the word "sketched" as used among surveyors, means that it is not the result of an accurate, actual survey, but simply an approximate idea of the maker's knowledge of the location generally. Commencing

on page 1,601, the witness is cross-examined on the subject of his alleged discrepancy and that continues for several pages, and this cross-examination serves to show that the witness in his previous examination had made several errors, and that in other respects his statement of discrepancies was subject to grave doubts. On page 1,621 he says that it is apparent that the man who made the 1821 map and the man who made the Davenport notes had information of the same survey; that the general outlines are alike and the courses and distances practically one set, and that in the main they are the same. That he thinks that by very careful work, field notes could be made from the map itself, which would make another map which would very closely resemble it.

Under the circumstances we do not feel that it would be useful to take up too much space or time to go into any very great detail of this testimony. The manner in which the test was made by Hale and Williams, under directions simply to take the lines as they conceived them to be (we mean the courses and distances from the field notes) and lay them on the ground, and that was done, and every test that an ordinary surveyor would make to correct or check the result of the courses and distances was to be ignored, and in ignoring those, you ignored every test of the accuracy, even of the witness, in drawing off these courses and distances, and in laying them on the ground with the compass and their own measurements with all of the inaccuracies to which the compass itself is subject. So that the result of that work, by their own admission is a conglomerate of the inaccuracies of the notes (if any there be), and also of the surveyors and the witnesses themselves and the instruments that they used, and this method condemns itself.

Commencing at the 64th mile, and where it says crossing the Tennessee River to a large white pine on the south side of the river to the mouth of a large creek and the 65th mile on a course south 75 west, and at a distance of 320 poles, and from there on where it mentions at the end of each mile the trees and the creek itself and lands at the end of the 72d mile on a ridge between the aforesaid creek and Citico Creek,

with the investigation that Messrs. Burns and Gannet have made of that locality, and the notes of the survey, certainly there can be no possible question that so far as these notes are concerned, Hangover Ridge and Cheoah River are absolutely out of the question, and the same result happens below for instance at the end of the 86th mile (record, 632) the bearing south 60 deg. west 320 poles to a holly tree, the 86th mile tree, which a line around the Tellico River could not reach by a mile and a half; the measurements and the shape of the line itself point to the line along the State Ridge inevitably, and all of these things make the contention of the State of Tennessee at both points absolutely untenable.

THE MARKED LINE.

In the testimony of W. D. Hale (record, 1311), introduced into this case from the case of *Hebard* against *Belding*, by stipulation, Mr. Hale says on page 1,313 that he surveyed the Hangover Ridge and gives a long list of trees, but there are only two of these trees that we desire to single out. One is a double sourwood in a gap, which he says was plainly marked, a fore and aft tree, with State line marks, about a mile from the river and three-quarters of a mile from the river he found a black oak, marked as a corner and some slight indications of marks as if it had been marked as a line tree on the State line. Of these two trees he produced blocks in the *Hebard* case, and they were the only blocks produced therein.

In looking for trees on the other line as contended for by North Carolina, he ignored all side line marked trees. In the case of *Hebard v. Belding*, as reported in the 103 Federal Reporter, the court assumes that there were two, or probably two, State line trees on the Hangover Ridge, but that the other line was the better marked line, and mentions that forty-one trees marked with State line marks were found on that line.

Hale says that the 86th mile tree (record, 1125), is undisputed. That the black oak that he mentions (record, 1,336), is on the ridge leading from Hangover to the Slick

Rock Creek, and that the sourwood tree was decayed inside so that its age could not be determined.

Williams (record, 1,433), says that he saw no trees on the Hangover Ridge that satisfied him that they were State line trees, and on 1,434, that it was not practicable to count the age of the marks on the sourwood.

All of the witnesses for the complainant, to wit, Burns, Gannet and Chambers, record, 555 to 559; Slagel, 760; Crisp, 562; Lovingood, 567 and 572; Bogle, 814 to 816; Hyde, 826 to 839, and Carver, 851 to 860, searched the Hangover Ridge and found no marks anything like the State line marks. William Jenkins (record, 167), who was acquainted with the Slick Rock Creek from the year 1859, says that he saw at that time the spruce pine at or near the mouth of Slick Rock Creek, about twenty yards from the mouth, which since has been destroyed by storm or fire.

Patten, at 369 of the record, in 1867 was investigating the question of taking over from his father in law two tracts of land on Slick Rock Creek, which had been entered in 1854, and in tracing the line found that same pine tree, marked with such marks as satisfied him that they were the old marks, and that this tree was ten or twelve steps below the mouth of Slick Rock Creek.

It seems that surveyors and woodmen acquainted with old marks have a way of distinguishing the similarity of marks and the instrument with which they are made, and the testimony shows that the State line marks were made with a small axe; and the testimony shows further that the so-called State line marks on Hangover Ridge were not made with the same kind of an instrument. And Hayes, at pages 796 and 802, and Bogle at 814 and Hyde at 826 and 827 and 838, and Carver at 851 of the record, testify that the sourwood tree was marked with miscellaneous marks that were not made in the same manner, nor with the same instrument that the State line marks along the undisputed portion of the line were made, but that they were made with the same kind of an instrument that Piercey, a former county surveyor of Cherokee County, used. This testimony comes from

a familiarity with the character of the marks made along undisputed portions of the line.

Burns and Gannet in their survey, Exhibit "D," have included a long list of State line trees, comprehending the trees along the whole survey from the 59th mile tree to the 101st mile tree, consisting of 124 different trees (see list on complainant's Exhibit "D" facing page 336 of the record), each one of which has been from time to time inspected and verified.

The witness for the complainant, H. P. Hyde (record, 825), enters into a good deal of detail in regard to the marked trees, especially with regard to the sourwood tree and the black oak tree, claimed to be State line trees by Hale, and in this describes exactly what marks are on those trees and why they cannot be considered to be State line marks; and on page 829 says that he found all of the trees mentioned by Hale, but found no State line marks on them. That there was plenty of good timber there that would have taken marks but they were not there.

The witness Burns, on page 231 of the record, describes the State line marks, both fore and aft and side line, and on the next page tells of the significance of these marks.

There is also an important bit of testimony in this witness's testimony in relation to a tree that has been designated now as No. 30, said to have been found by Mr. Gannet. The witness Hale says that this tree bore undoubted State line marks, but that they were not old enough. This tree is about a quarter of a mile from tree 29, on the north-east bank of the Tennessee River toward the Slick Rock Creek. Hale blocked one side of the tree and brought the block in containing the blaze, but the part containing the hacks was left upon the ground in chips. On page 342 Burns goes into the details of this tree and states that they were not only State line marks, he having blocked the other side of the tree, but that they were eighty-nine years old, and the block that he took out was on the side up the river; it was a chestnut oak, 20 or 24 inches in diameter.

On page 366 he states that on his last trip he walked down the Tennessee River, passed tree 29 and continued on down

to tree No. 30. That at that time he did not follow the stream any further than tree 30, but on that trip he found about 150 feet further up the river from tree 30 a hemlock tree marked as a State line tree, very old marks, which he believed to be the original State line marks.

On page 367, on redirect examination, he states that there were two trees marked with State line marks between tree 29 and the mouth of Slick Rock Creek. That tree 30 is about 1,475 feet from tree 29. That he found the tree had been blocked on the east side, and he blocked it on the western side, and the block is in evidence in this case, labeled No. 11. He states that Mr. Gannet found this tree.

At various points in his testimony, particularly at pages 367, 368 and 369 of the record, he designates the trees that he found and states that Mr. Gannet had found some others which had been added to the list.

Mr. Gannet, on page 417, goes into considerable detail also of his survey from the 101st mile northwestwardly, and states the number of trees that were found and were located between particular points. On page 417 he states that they found forty-seven trees, State line trees, between the junction and the Tennessee River on the Slick Rock Creek line, and he states that these trees that they found were marked exactly like the trees that they discovered on the undisputed portions of the line (record, 419). On page 427 he gives a list of the trees that he personally had observed, and states that he discovered tree No. 30, which has been already mentioned and testified about. On page 439 he testifies concerning tree No. 30, and states that it is a chestnut oak about thirty inches in diameter, and that it had two hacks and a blaze on the west side and the same on the east side; and both Burns and Gannet testified that those marks on the block that they brought in were of the right age to have been made by the Commissioners.

With regard to this tree 30, Hale, while admitting that the marks were State line marks if they were old enough, denies that the marks on the block taken out by Burns (record, 1,152), are of sufficient age, but he qualifies it in this way: He says, "I have examined this block and I find very

clearly defined in the wood 88 or 89 years old, four distinct hacks, but no blaze for that age. I do find a blaze in that wood about 57 or 58 years old, at the proper depth of that age, but none at the depth of 88 years." And afterwards on the same page he states that the blaze is 59 years old, but the hacks 88.

No witness in the case knows of any grant as old as 1821, and on 1,153 Hale states that it is sometimes very difficult to tell the age of marks. On page 1,149 is where the witness Hale states that he only cut out the blaze and destroyed the Hacks, leaving a part of the block on the ground. The hacks and blaze, which are clearly like State line marks, Hale testifies date back to about 1853.

John L. Williams, who has stated as heretofore mentioned, that he was never satisfied there were any State line trees on the Hangover Ridge, testifies at page 1,441 of the record, with reference to this tree 30. He corroborates the testimony of Hale as to blocking that tree, and states on 1,442 that those marks that they blocked were about 58 years old, but they only blocked out, or brought in, the blaze. That the hacks were cut out but left in pieces on the ground, and this blaze was divided into three parts, one of which Hale kept; the second piece was kept by Williams, the witness; and the third by Mr. McNab, and these were brought in to be fitted together and are blocks Exhibit 1 to Williams' deposition. But, when they tried to fit them, they would not exactly fit.

On page 1443 he corroborates Hale, that while the hacks on Burns' block of that tree are 88 or 89 years old, he claims there is no blaze there, and gives his reasons.

Inasmuch as these marks are in appearance unquestionably State line marks, yet they are denied to be State line marks because of the requisite age, and yet there is a mark on the Burns block 88 or 89 years of age, that apparently may be, or may not be a blaze. Burns and Gannet say it is; Hale and Williams say it is not. But, as far back as 1821 there is no evidence that anybody was marking trees in that locality except the Commissioners, and it would seem

that the marks must have been a state line mark and that the later marks must have been a remarking.

The witness Williams himself says that there were evidences northeast of the river of a remarking of the line at some points in about 1853. The State line was different from corner marks, and yet these are unquestionably in appearance State line marks. There is no evidence, nor would there be any reason to suppose that people right on or near the State line itself were imitating State line marks.

The witness McNab, who was a witness for the defendant, on pages 1,526 and 1,527 describes the block that Hale took out, also Burns' block, and at the bottom of page 1,527 to the top of 1,528, says that there are four hacks on it, nothing to indicate a blaze, only a dead spot at one of the hacks. He says if the hacks were not there, it might be taken for a blaze, but he thinks it was not intended for a blaze.

Messrs. Burns and Gannet were both experienced witnesses, which means a little more than that on looking at a tree they can tell what kind of tree it is, as, for instance in this case, it betokens an acquaintance with land marks and the method of making them; what they indicate, the instrument with which they were made, and their probable age.

According to the testimony of the witnesses for the defendant, it might be argued that they think that neither line was marked, for they certainly have shown no State line marks on Hangover Ridge, and attempt to discredit the marks on the other line contended for by the complainant.

The testimony with reference to tree No. 30 is of some considerable importance, not so much to the plaintiff as to the defendant, because the plaintiff's witnesses in their testimony inevitably point to the fact that the commissioners were going down the river towards Slick Rock Creek. If tree 30 was an isolated tree, and there was no corroborative evidence in the case; in other words, if it seemed strange and unnatural that that tree could be a State line tree, then there might be some reason to weigh carefully the contradictory testimony of the various witnesses. It seems to us that the character of that tree is to be determined on larger lines than

the mere weighing of contradictory statements as to the character and probable age of the marks.

When we consider that the marks themselves are evidently State line marks, or imitations of them, and that the marks whatever they are, on Burns' block No. 11 taken from that tree, in evidence, were certainly made about 1821, and that there were no entries, much less grants, in either State in that territory so early as that, and no probability that anybody would designedly imitate the State line marks, or would be making any marks whatever without any evident purpose; and further, when we consider that that tree is in the line that is indicated by the map of 1821 and the commissioner's report, fixing 65 miles as the point at which they passed the Tennessee River, and is entirely in accordance with the field notes of Davenport, and is in the line of the other marked trees, both north and south of the river, the conclusion becomes almost if not quite irresistible that that is a State line tree and is in the line followed by the commissioners.

W. P. Chambers, a surveyor of Bradley County, Tennessee, one of the complainant's witnesses, whose testimony begins at record 551, after describing what he did in the way of surveying the line, says on page 554 that he found tree 29, and on 555 that he found the chestnut oak tree 30, marked on the northeast side, and a little further along on that line towards the creek found a maple marked with three hacks on the north side, and just below Slick Rock Creek, found a black gum marked with three hacks. That all of these were old marks and had the same general appearance and seemed to have been marked with the same instrument, at the same time.

That the next day he crossed the river and resumed work and found marks up the creek, along the spur and Big Fodder Stack, which also were the same kind of marks as he found on the north side of the river, made by the same instrument and in the same manner, and at the same time, and that any man could satisfy himself that the line ran up that way.

On page 560 he says that the trees marked on the north side of the river between tree 29 and the creek ran in a

westerly course; that the maple and chestnut were marked going down the river and that the gum was marked on the opposite side. On page 560 he describes how surveyors mark trees, and what these marks indicate, and states on 561 that the marks on the gum indicated that the marker crossed the river and went up the creek.

He then states that the Ocoee map shows that the line runs up the creek, and on page 562 that no grants in Monroe County, Tennessee, call for a crossing of that creek.

Francis Lovingood, record 565, speaks generally of the marks up the creek.

C. L. Slagel, a surveyor and witness for the complainant, whose testimony begins record 753, states in the first place that with the notes they found some of the trees indicated at the ends of the miles with old marks on them as old as 1821, and speaks principally of the birch at the end of the 67th mile, the sycamore at the end of the 68th, the birch at the 70th mile; all with old marks on them as old as 1821, and likewise with reference to the poplar at the 72d mile.

That he examined the Hangover with care and found no marked trees (State line trees), on it.

H. S. Hayes, for the complainant, a surveyor, whose testimony commences at 794 of the record, and consists of the testimony taken in the *Hebard v. Belding* case, adopted by stipulation in this case.

He states that in the territory which was in dispute at that time, consisted only of the Slick Rock Creek dispute; that on the Slick Rock Creek line they found 41 trees that are taken notice of in the decision of the United States Circuit Court of Appeals in the case of *Hebard v. Belding*, 103 Federal Reporter, 541. He further says that the marks on Hangover were not made with the same kind of axe that the marks on the 41 trees were. That the marks on Hangover were made with an axe such as Piercey, an old surveyor of Cherokee County, used. That there were no marks on the Hangover Ridge earlier than 1852. That his tree No. 1 was about one pole west of the creek.

J. C. M. Bogle, one of complainant's witnesses (record,

812), says that the black oak about three quarters of a mile from the river (record, 814), which Hale has described as on the spur leading to the mouth of Slick Rock Creek, did not have marks that were old enough, and that the sourwood had no State line marks on it at all; that they were irregular and were made with a broader axe and were not over thirty or forty years of age.

On page 815 he goes on with an enumeration of the trees that Hale had mentioned, and corroborates the witness Hayes on that subject. And on 824 he makes a diagram of the marks on the sourwood tree.

This is one of the witnesses who states that the main ridge called for does not begin until you get to the junction.

H. P. Hyde, a surveyor, whose testimony begins on record 825, states that he found Hale's red or black oak, three quarters of a mile from the river, describes the marks and states why they are not State line marks. That there was an "x" on it, which is quite a common mark in North Carolina for a beginning corner to a tract.

On 827 he describes the marks on the sourwood tree and explains why they are not State line marks, and on 828 goes on with the various trees discovered by Hale, and speaks of the hickory which Hale enumerates as not containing any State line marks, but it does contain marks showing it to be in the line of entry 920 of North Carolina. On 829 he says that he found all of Hale's trees and that there were no State line marks on any of them except possibly one, and that those marks were not old enough, although there was plenty of large timber on Hangover Lead.

On 835 he speaks of having made another examination, and confirms his former opinion. On 836 he again takes up the question of the black oak and describes the marks, and states that there are no axe marks on it at all, and continues as to that and the other Hale trees on 837 and 838, and on the latter page says that the marks on the black oak were made with a smaller axe than the State line marks were made with. On 843 he says that tree 29 is marked fore and aft for Slick Rock Creek.

This witness is also of the opinion that the main ridge does not commence at all until you reach the junction.

Reuben Carver, a surveyor (record, 850), was with Hayes and Bogle in making their survey and he examined Hangover Ridge twice carefully.

On 855 he says that the marks on the Slick Rock Creek line correspond with the marks on the spruce pine or hemlock tree 29, and have the appearance of having been made with the same axe, cut in the same way, and with the same size axe. This witness takes up the block exhibited by Hale from the black oak tree and other exhibits of Mr. Hale, extending over on to page 867, and corroborates the other witnesses for the complainant in respect to the testimony that those trees were not State line trees. And again on pages 860 and 861 he gives evidence of the same character.

We, therefore submit, most confidently, that all this testimony, with overwhelming force establishes the facts: that the Commissioners were never on Hangover Lead; that they never considered it in running the line; that it was never run as a portion of that line; that it was never marked as that line; that it is utterly irreconcilable with the map of 1821, with the Davenport field notes, and the other parts of the undisputed line in the neighboring localities; that the Hangover line is purely an invention of Hale and the land speculators in 1892, the first time that claim was ever made, and the beginning of all the subsequent confusion and trouble.

The defendant's witness Hale makes a very strenuous effort to belittle the evidences of where the Commissioners in fact located the line, and that is the only question at issue. But even if he were successful in shaking any one of the classes of testimony introduced, taken together and pointing to but one result, and with an entire absence of any evidence in favor of the Hangover Ridge, except as to the opinion of Mr. Hale and his associates as to which was the main ridge and where the Commissioners ought to have gone, it would seem that the conclusion is almost, if not quite, irresistible that the Slick Rock Creek line is the one that the Commissioners actually located, marked and adopted.

THE SURVEYS.

The two principal witnesses for the complainant are D. B. Burns and S. S. Gannet. To take these up in their order, Burns (commencing record, 226), states in the first place his education as an engineer and surveyor, and next his experience, and on page 227 states his experience in retracing old lines that have been found marked, and that involved a comparison of other statements with the actual work on the ground, and that ever since he was sixteen years old he had been in the habit of going out into the mountains with his father, who is a lumberman, and that he is familiar with land surveying and with old land marks.

On 228 he states that he commenced his survey in April, 1908, and used a transit, and on the next page, in answering the question as to whether he discovered land marks and marked trees along the line which he surveyed, he answers that he did, and explains what those marks were; that they were State line marks, and states that a person who had been in the habit of tracing up old line marks can tell whether they are State line marks or not from the appearance of the marks, and adds that if the axe mark did not pass entirely through the bark, that the only way to tell the age of the marks would be their appearance.

He commenced his survey from a point about 3 1-2 miles north of the Tennessee River and surveyed from that point to the Unicoy Turnpike to the 101st mile post, a distance of forty-two or forty-three miles. When he began the survey on the Smoky Mountain he took an observation on the North Star in order to determine the true meridian north and south. That he surveyed about six miles and took another observation on the North Star, and checked his work by the various angles from the first observation, and then continued the survey to the junction of the Hangover Ridge and Big Fodder Stack Ridge and took another observation at that point and found that all his calculations checked with each other. That he checked his work from the State Road on the Smoky Mountain to the junction in three different places and was perfectly satisfied that his work was correct.

On page 230 he states that about a year afterwards he surveyed another line, an accurate transit line, from the junction over Stratton Bald, down the main ridge to the Cheoah River, and down Cheoah River to Slick Rock Creek and tied on to the line he had run the preceding year, and found in the entire circuit practically no error at all.

That this last survey covered a distance of twenty-five miles and that the only error in that circuit was about fifteen feet, and that this was an absolute check on the accuracy of his prior work. That he ran a base line down the Cheoah River and likewise the Tennessee and other streams. That he surveyed Slick Rock Creek and Cheoah River. That his plat shows a system of co-ordinates; that those lines or squares as they appear on the tracing are drawn out at the distance north and south and east and west by the true meridian, and represent the true north and south and the true east and west. That these lines are a distance of five thousand feet apart and represent what would be known to any engineer as the co-ordinate system of platting lines. He then explains that what he means by that is that every point on that map has a distance which is figured from the axis whose crossing is the origin of that system, that is a given number of feet from the east and west axis, or a given number of feet from the north and south axis, the distance being due west or due east, or due north or due south from the point called zero or origin; and that this system of squares insures accuracy of platting and it is impossible to make an error that you cannot detect.

He then explains the system of tree marks that was used by the Commissioners, and on page 232 their significance. In making this survey he had with him the plat, or map of 1821. He then goes on to state about the first tree or two that he blocked and introduced in evidence as block No. 1, taken from tree No. 13, a white oak, and states that this block No. 1 shows that the tree had apparently been remarked and that it showed both the old and the new marks, and this block is offered in evidence.

On page 234 he explains that when he got to the river that he took the map of 1821 and went to a point on the north side

of the river opposite the mouth of Slick Rock Creek at an elevation of four or five hundred feet, from which position he had a splendid view of the whole Slick Rock Creek basin and all of the principal peaks, the Big Fodder Stack, Little Fodder Stack, Hangover, and the whole Slick Rock Basin.

That he noticed from the original map a distance of six or seven miles south of the river a practically straight course and then a decided break to the left. That he took his instrument opposite the mouth of the creek and set it up upon the same bearing taken from the original map, and found that the bearing took him right over Big Fodder Stack. He had been led to believe from information before he got to the ground that the line went over the Little Fodder Stack, and he expected to find the line there; but, after using the compass in that test, he found that it went over Big Fodder Stack, and he then abandoned the idea that the line could have gone in any other direction than up Slick Rock Creek and over Big Fodder Stack.

He then began his investigation for marked trees. He drew a line from the mouth of the stream marked "creek" to that first decided angle to the left, and after ascertaining that bearing, set his compass on that bearing and found that it carried him over Big Fodder Stack, and that that gave him the idea that the line ran up Slick Rock Creek. That the line on the north of the river trends southwest in its undisputed part, and as you go down on that course you can see right in front of you the Big Fodder Stack. He then speaks of finding tree 29 and states that the marks that they found on the line north of the river corresponded in general appearance and in appearance as to age. That he went up the Slick Rock Creek 4.9 miles, finding a number of marked trees. In the first two miles they were plentiful.

He continued the survey up the Slick Rock Basin to Big Fodder Stack Lead, finding also a number of trees, one of them a fore and aft tree, and then introduced in evidence block No. 4 from tree 41. He found marked trees on the Big Fodder Stack Ridge, the Big Fodder Stack, and from Big Fodder Stack up the Junction, and in that space found twenty-six trees—undoubtedly State line trees. He then con-

tinued the survey from the Junction to Laurel Top and found quite a number of State line trees between the Junction and Laurel Top. From the Junction to Laurel Top the line is undisputed. The survey was then continued from Laurel Top to Jenks Knob, but he found no trees between Laurel Top and County Corners. From County Corners he surveyed southwest down the State Ridge and found along the State Ridge to Tellico many State line trees, and among others just across the Tellico River found tree 107, which has been designated as the 86th mile tree, which on page 241 he says was marked on the right hand as you go to Jenks Knob. This holly tree, the 86th mile tree, stands about a thousand feet from the Tellico River, and between County Corners and Jenks Knob there are eighteen State line trees.

On 242 he says that the State Ridge tallies with the map of 1821. On the same page he says that he went, after completing the survey to Jenks Knob, with Mr. Gannet to the 101 mile post, where the Unicoy Road crosses the State line, and from that point they ran a joint survey of the line to Jenks Knob and tied to the line that he had previously run in March.

That the most of that ridge is barren and has been cleared of timber, though they found seven or eight trees along there that were State line trees, and that he also found one fore and aft tree on the line south to the Georgia line and produces the block No. 10 from tree 21, which counts and demonstrates that it was a State line tree.

On 243 he then speaks again of the survey that he made from the Junction back over Hangover and states that he found no State line trees on the Hangover line. He describes the ridges to Cheoah and to Slick Rock Creek. On the north of the river he began his survey at the Smoky Mountain Road, while Mr. Gannet surveyed from there back toward the Gregory Bald and stopped at the 59th mile tree, and states that from there (record, 246), the exact measurement is 6.02 miles to the south side of the Tennessee River at the mouth of Slick Rock Creek, so that their 65th mile falls in the Tennessee River, while the distance from the 59th mile tree to the south side of the Tennessee River as claimed

by the State of Tennessee is 5.47 miles, and from there to the Junction by the Slick Rock Creek from its mouth is 10 miles and 16 miles to the Junction from the 59th mile tree, while it is only 14 by the Tennessee contention.

On page 247 he gives the bearings according to his survey and as compared with the map of 1821. This survey was carefully made and checked over, and as we shall see, Gannet, when he comes to testify, states that in his testing of Burns' work, he found it the most accurate that he had ever seen in that kind of rough mountain surveying. The outcome of this survey of Burns' is exemplified by the various maps which will be hereafter listed with the pages of the record where they may be found.

S. S. Gannet, another witness for the complainant, whose testimony begins at 408, is an employee of the United States Government in its Geological Surveying Department, with the title of Geographer. On 409 he gives his technical acquirements and then goes on to detail his practical experience in such work, and on page 409 states that from the year 1882 to 1886 he did work in the western part of North Carolina, and further has knowledge of trees and marks upon them, or that bear upon the question of surveyed lines and the indications of those marks.

At the top of page 410 he states his further experience in this particular kind of work, as follows:

"In 1897 I was detailed to the Indian Bureau of the Interior Department to locate the intersection of the 107th meridian with the Colorado-New Mexico boundary line by means of the marked line; and again in 1898 I was detailed to assist in the work of locating the boundary line between Montana and Idaho, starting where a certain meridian crosses the Bitter Root Mountain, and established that by astronomical observations. In 1908 I was engaged throughout the season in remarking and retracing the boundary line between Idaho and Washington for a distance of about 120 miles," and further:

"On May 31, 1910, I was appointed by the Supreme Court of the United States as one of three commissioners to mark the boundary lines between Maryland and West Virginia.

The case was decided in May by the Supreme Court, and I was appointed as mediator representing the United States."

On page 411, he was asked how he happened to be connected with this matter. He says the Attorney-General of North Carolina requested the Geological Survey to investigate that question and to find out if possible where the original line was run and marked; and "I was selected by the director of the geological survey to engineer the work."

In reference to the directions as to what he should do, he says: "I was to actually go on the ground and find out from my knowledge of the country and experience in such matters where the original line was actually run and marked." And further, "It was my duty to find out the truth about where the line was run, regardless of whom it affected."

In detailing his action upon the ground he says he first went to Murphy, North Carolina, and started from that place and went first to the 101st mile post, where the turnpike crosses the Unicoy Mountain and that he then ran a line southward. On that part of the survey he was accompanied by D. B. Burns and some other men. A Mr. Hugh Sadler of Tennessee showed him where the 101st mile post was, and accompanied him down the line.

He made an investigation in the vicinity of the 101st mile post to determine whether the position designated was the correct one, which resulted in his conclusion that it was correct. He participated in taking a block from the tree about 500 feet south of the first mile. He was acquainted with the State line marks. From the 101st mile tree he ran a line northeast, which he was able to identify by the marked trees and the plat Exhibit "D," a copy of which is introduced into this case so signed by him in connection with Burns.

This witness had with him the 1821 map, and on the way from the 101st mile tree to Jenks Knob he found 12 State line trees. He then surveyed down Jenks Ridge and up the State Ridge and found State line trees. Between Jenks Knob and County Corners 20 State line trees. From Jenks Knob to County Corners he made his own survey entirely independent of Mr. Burns and this survey was made with the same

instrument that he used in surveying the line between Idaho and Washington and employed exactly the same methods which were approved by the United States Government, and they proved that Mr. Burns' survey was correct. That in making this survey he used a different method from Mr. Burns so as to check his work, but the results tallied.

He states with reference to the Tellico Country that if you follow the course of the plat of 1821, you have to cross the Tellico River, and that he learned from personal examination that the angles on the plat and the marked line agree. That for an undisputed portion of the line to the Junction he did not retrace the line, as he had been over that part of the work in 1883 and 1884 and had been on Haw Knob and other high points on that ridge. He then went to the Junction where he was joined again by Burns.

That from the Junction to the Stratton Bald and along Hangover he found no marks, and continued his investigation of that ridge to the Tennessee River, looking very carefully for State line trees, but found none. That the sourwood was the only one that by any stretch of the imagination could be called a State line tree. That it was impossible to tell its age and he would say that the marks on it were placed there promiscuously, and without any regularity. There was one place which appeared to be a blaze and a hack, and another two hacks above a blaze, and another three hacks above a blaze, but the hacks were not old enough.

He then went from the Junction along Fodder Stack and down Fodder Stack Lead to the forks of Slick Rock Creek and then to the mouth of Slick Rock Creek, and between there and the mouth of the creek found a number of trees well marked, which gave every appearance of being State line trees. That he went out on to the Little Fodder Stack but found no indications of the State line there. On the top of the ridge leading from Big Fodder Stack to the forks of Slick Rock Creek he found a hemlock tree which had old State line marks on it, but further down the ridge there were no suitable trees for being marked, or if there had been, they had been destroyed by fire. Just above the mouth of Slick Rock Creek he found several well marked trees, some

of which had been formerly blocked by other surveyors, and there were eight trees above the forks of Slick Rock Creek that he could identify. That from the forks of Slick Rock to the mouth is little less than five miles.

After finishing the examination up there, he went along the creek down to its mouth and found several trees near the mouth of the creek. All of these trees that he speaks of, he says (record, 417) were marked like other undisputed State line trees, and marked with the same instrument. He found 26 trees between the Junction and Big Fodder Stack, 10 from there to the forks of Slick Rock Creek, and 11 from there to the mouth of Slick Rock Creek; 47 trees in all, which in his opinion were all State line trees. That his survey carried him from the Slick Rock Creek line, and the marked line carries you the same way. To start with, he says the timber on Hangover Ridge is scrubby, but below the Hangover Peak the timber is good, and would have been suitable for marking in 1821. That the timber was good at the Sourwood Gap and he found a number of trees along there that would have been suitable for retaining the marks. That he examined all these trees with care but found no marks that indicated that they were State line trees. That there were one or two that had been marked promiscuously.

This witness then, after getting to the mouth of Slick Rock Creek, crossed the river and followed the line along the Smoky Mountain north of the river to the 59th mile post, and from the crossing of the road, or the commencement of Mr. Burns' survey, to the 59th mile post, he surveyed personally and Burns was not along. It is on page 418 that he said, speaking of Burns' notes: "His notes, as well as the body of the plat which he made, and the plat of 1821, and my notes were compared right along." And it is here where he says, "I would say that I found his work certainly the most accurate work I ever had dealings with, especially considering the fact that it was in such a rough country. I have never known work to be so accurate in such a rough country."

Going back again from the 59th mile tree, he says they followed the undisputed line southwestwardly, finding

marked trees exactly like those he found below, and that sighting along from the northeast side of the river in the direction of the Tennessee River by the course of the line, the Big Fodder Stack is a prominent peak in the line, and it would be natural for surveyors following the main ridge to take the Big Fodder Stack as an object to which they would go on the other side, and that surveyors would naturally select the Fodder Stack. And from the northeast side of the river it appears that the Slick Rock Creek and Big Fodder Stack lead directly to the summit on the other side, and that this line coincided very closely with the plat of 1821, the other route being entirely too far to the left or east.

They found tree 29 and observed that just across there is a very steep bank, almost inaccessible, 800 feet high, and spread out up and down the river three quarters of a mile, which made it not a practicable route because it was too steep, and it was practically impossible to survey a line up and down that bluff. He then speaks of tree No. 30 and states that it was evidently a State line tree. This was on the way down to a point opposite Slick Rock Creek going from tree 29.

He then says that the Fodder Stack Ridge averages higher than the Hangover; that the latter is more broken and there are more deep gaps in it. On page 423 that the Fodder Stack is the leading ridge on the south side of the river, and has a greater average altitude and continuity. Hangover is much more broken.

On 427 he says that the Burns and Gannet map corresponds exactly with the data obtained upon the ground and that the marked trees were all on the North Carolina contention and none on the Tennessee contention, and states further that he found tree No. 30 and that it is a State line tree.

He then goes on to give a lot of details as to the distances and states on 429 that the stream marked creek on the 1821 map could only be Slick Rock Creek; that the Cheoah River is more than a mile and a half to the east and could not possibly be the stream marked "creek." He gives the difference in the angles.

There are a number of other surveys that have been made by surveyors who have testified for the complainant, some of

which were made for use in the Hebard case, and other new surveys, but these two surveyors went more carefully and more accurately over the ground and in their testimony and in the maps filed are much more minute and definite in their conclusions, and it will only be necessary we think to allude to the fact that these surveys by Collett (record, 547), Chambers (551), Crisp (562), Lovingood (565), Slagel (753), Hayes (794), Bogle (812), Hyde (825 and 833), Carver (850 and 854), all found the line to be on Slick Rock Creek and as claimed by the State of North Carolina.

Of the surveys made by Burns and Gannet, we may say that these gentlemen went there to ascertain where the commissioners actually located the line. In following down the line on the north side of the river, certainly as far as the 64th mile tree, there was no ground for an error, and from that point there could have been nothing more natural, having the map of 1821 before them showing the shape of the line, than to go to Slick Rock Creek. Looking over on to the southwest side of the river, it was impossible to conceive that a line of that shape could go over the Hangover Ridge, and it was impossible to conceive that the stream marked "creek" to the right meant the Cheoah River a mile and half away to the left, and that following the Cheoah River for any distance could ever tend to land the surveyor at the Junction, where again the line became undisputed.

The shape of the lines indicated the path, if you take nothing else. A curve to the right going to the mouth of Slick Rock Creek, or any other point to the right, and at seven miles, taking a turn to the left and reaching the Junction, could never fit a curve starting opposite tree 29 and turning to the right at entirely different angles.

Hangover Ridge having been described by these witnesses as not the main ridge at all, and that the ridge to the Cheoah River is the main ridge of that ridge, and the description of the Hangover Ridge for several miles south of the river as being only a gradual ascent broken by deep gaps at many points, certainly would justify the selection of the Fodder Stack Range as the outlet to the Slick Rock Creek and as the easiest way to get to it. The shape of the line itself points

inevitably to that conclusion. And, when these surveyors on further investigation discovered that the line up this stream marked "creek" along to the Junction and from there down to the 101 mile tree is well marked and refer to the fact that the Commissioners stated that they had marked the line, and furthermore, after careful examination finding no State line marks on the Hangover Ridge, and in this latter regard it is more than likely that they are entirely correct, because Williams, defendant's witness, said that he never saw any trees on that ridge that satisfied him that they were State line trees, how could these surveyors come to any other conclusion?

So far as the surveys of Hale, Wilson, Muller, and Williams are concerned, we have already stated that in our opinion all of these surveys were dominated by Hale and adopted his views.

We treat Kent, one of defendant's witnesses, as a negligible quantity. This man's testimony is found commencing in the record at page 1,489. Crisp, one of our witnesses, was with Kent, who was employed by the Babcock Lumber Company.

Crisp says that they went on to the north side of the river; that they had no instruments along with them, and that Kent took a straight stick and sighted backwards on the undisputed line and then turned and sighted in the same general direction across the river, and that his line of sight across the river struck the Big Fodder Stack. That thereupon they went across the river and investigated the Slick Rock Creek contention, and as a result of it, Kent said that the line must have run along the Slick Rock Creek and that he would so report. He is brought in to testify and denies that he said he would report that, and in fact adds his testimony to the other witnesses for the defendant that the line must have been run along Hangover Ridge, because, for the unique reasons that he could not see why it should go anywhere else and because his line of sight to the south struck Big Fodder Stack. That that is an additional reason that he thinks the commissioners chose Hangover Ridge.

He admits that he did use a stick in making sights, but just what degree of straightness that stick had, and how near

in turning around he got on to the line of sight, and how steadily he held the stick, we have no means of knowing.

At page 1,495 he says that he was mainly looking for a main ridge and that Hangover appeared to be higher and bigger to him than any other, and that he could not get into his mind that Fodder Stack was the main ridge; but on page 1,497 he admits that he did find a tree, which was apparently a State line tree, with three hacks on it, eighty-seven years old. On 1,499 he says the most reasonable and probable route seemed to be to cross over at tree 29 and go over the Hangover to the Junction. On 1,501 he says that Hale's and Burns' maps both seemed to be right in direction from Knob to Knob and in measurement.

On page 1,505 he admits that he first thought that the Little Fodder Stack Ridge might be the main ridge. On 1,507 he states that the Cheoah River Ridge is the main one for a mile or two, but the peculiarity of this gentleman's testimony is on page 1,510. He was asked if he made a report of his conclusion to Mr. Shields, who was the attorney for the Babcock Lumber Company. He was asked this question.

Q. Did you report to him that it went over Hangover?

A. I reported to him what I found.

Q. Did you give any information as to where the State line ran south of the river? A. I reported my findings.

Q. Did you report that it went over Hangover? A. I think I told him I thought so.

Q. Do you remember what you reported? A. Not absolutely.

Now here was a matter that this witness knew was the subject of great discussion and litigation, and of interest to two sovereign States. This testimony of his was taken on January 7, 1911, and he had made his investigation about the middle of June 1910 (record, 1,491), or thereafter, and he had made a written report, and yet did not remember and could not tell whether he reported in favor of the Hangover location or not. But, after answering the questions as already indicated, on further pursuit, he says: "I reported my opinion." And, in answer to question 175, page 1,510, he says

he must have reported the Hangover line, because that is what he found.

The testimony of W. D. Hale, the defendant's principal witness, is justly subject to criticism. The man is not a very safe guide who stood on the Smoky Mountain on the north of the Tennessee River and surveying with his eye the topography of the country across the river, and with his eye picked out the locality of the State line, regardless of his own survey, and makes everything bend to his own caprice, disregarding all courses and distances of the map of 1821 and the shape of the line, which is evidently not over the Hangover Ridge, and all marks; and who still in the face of all the evidence to the contrary adheres stubbornly to that first impression, not only at the Slick Rock Creek locality, but in the Tellico River country, where not only the shape of the line and the absence of all marks, but the great overplus of distance around, and the fact that you miss the 86th mile tree, an undisputed point, by a mile and a half, all concur in excluding any line as contended for by the defendant, and then attempts to disprove the Davenport notes by ignoring every natural object and every mark and every indication of the 1821 map, and in a way not customary with surveyors in using old maps and notes, and in a way manifestly unfair according to the testimony of John L. Williams, his companion in that work (record, 1,590). He surely can be justly charged with having warped his judgment by a strong bias arising from his first impression, which he is unwilling to allow to be affected by reasons too strong to be disregarded.

Nothing can be clearer than that Hale picked out ridges only. That those ridges were selected by him, not with reference to where the line actually was located, but where it ought to have been located, and he locates it there and nothing can convince him to the contrary, and his refuge, when every other consideration points to some other locality, is in his assertion that the commissioners went along and marked that other line, but that they abandoned it.

We hope we do not use too strong language when we say that this man's testimony is unworthy of consideration, and that all of the testimony that is grounded on it falls with it.

The witness John L. Williams for the defendant, was not willing to follow Mr. Hale in all of his conclusions, and was forced to admit that if he found the marked line, and was sure of the marks being State line marks, and they were along Slick Rock Creek and the spur from Big Fodder Stack and State Ridge, these together with the notes of Davenport and the map of 1821 would have forced him to conclude that the North Carolina contention was correct.

TRADITION.

The land district in Tennessee in the neighborhood of the Slick Rock Creek contention, was called the Ocoee Land District, and in 1837, by legislative direction, the Commissioners of that land district sectionized it, and according to the map that they filed, which is in evidence (Record, 88) Slick Rock Creek was the eastern boundary of Monroe County, Tennessee, and the Ocoee Land District at that point.

Some evidence was given for the defendant, that although the Commissioners of that district filed this map as the official record of the district, yet in fact they did not intend to make Slick Rock Creek the eastern boundary line. The idea was that the land over to the eastward was very wild and uninhabited, and they were tired out and they simply located it over and intended the Hangover Ridge for the eastern line. But the fact remains that according to the documents that they filed publicly they did not so lay it down. This fact was considered by both Courts that decided the case of *Hebard v. Belding*, as having considerable weight and did not seem to pay any attention to this explanation, and in fact, the referee in his case said that the reasons given were not satisfactory to him.

The Court in the Hebard case also noticed the fact that from about that time on until about 1882, there was a tradition that Slick Rock Creek was the dividing line, but seemed to think that it was engendered by the Ocoee Land District map. With all due deference to the Court, we think that

that is an error, and that the map itself so fixed the line on account rather of the tradition than vice versa; and in fact, at about that time, in 1837, there must have been a considerable number of people living who knew where the line had been located, and when papers were in existence which authenticated that knowledge. In other words, that the tradition and the map were the product of a knowledge that the line was located on Slick Rock Creek.

The parties who are interested in the lands in the Slick Rock Basin under grants from the State of North Carolina paid taxes to that State from the year 1860 (see stipulation, record, 782), and Judge Clark in the original opinion in the Circuit Court in the *Hebard v. Belding* case, stated that the occupation by them and the payment of taxes, and the Ocoee Land District map, might have created an estoppel, but that the State of Tennessee could not be estopped. That was true in an action between private parties, but in a case like this of original jurisdiction, where a State can be sued without the leave or license of the State itself, would not the doctrine of estoppel apply? In other words, in a case where a State may be sued, even against its will, is it not the fact that the ordinary rules of law must be applied, as in private litigations? This would seem to necessarily follow, because the freedom from estoppel arises from the same principle that governs the freedom from being brought into court to defend an action, but after all it is not a question of estoppel.

Those matters were only sought to be used in that case as cogent evidence that the State of North Carolina was correct, and of that fact they are evidence.

In the Hebard case, the Court of Appeals also decided that the evidence as to the declarations of old residents, both of Tennessee and North Carolina, were admissible on the point of the location of the line. Commencing on page 155 of the record and extending to the commencement of the testimony of D. B. Burns, on page 226, there is the testimony of a large number of witnesses, who heard old residents who knew about the location of the State line declare where it was.

The first one is N. G. Phillips, who knew one Thomas C. Tatham very well, who at the time of the giving of the testi-

mony had been dead a good many years. That Tatham had declared to him long before any litigation arose over it, that he was with the Commissioners and that the State line ran up the Slick Rock Creek and then up a ridge and over the Big Fodder Stack, and on page 157 that he explained exactly how they got across the river, and that Piercey, an old county surveyor of Cherokee County, was so told and had always acted on it. That he had heard other men (giving their names) say the same thing. On page 159 that that was the general reputation. And on that page, and page 161, says that the Tennessee contention was never talked about until about fifteen years before that, and that Graham County had exercised jurisdiction over that whole territory.

William Jenkins (Record, 165) talked to a man by the name of Foster, who was with the Commissioners, and who stated the same location and located the line along the State Ridge also.

David A. Hyde (Record, 169) knew Tatham and heard him tell Piercey that the State line was up Slick Rock Creek and over the Fodder Stack. This was in 1855.

N. F. Cooper (Record, 172) heard various old citizens long since dead, say the same.

Ropetwister (Record, 174) heard it described by old citizens and also states that the Cheoah River was known by that name when he was a boy.

William Williams heard the same from old citizens and says that the line was never in dispute until about fifteen years ago. Many of those whom he had heard were citizens of Tennessee. And, on page 182, he says he heard Levi Mashburn talk the same way. This Mashburn was with the Commissioners.

James Williams heard the same.

W. P. Taylor (Record, 186) knew Tatham well and Tatham told him the same, and others.

V. E. Grant (Record, 190) tells the same story.

E. W. Harrison (Record, 196) gives instance of where old people had told him the same.

O. P. Williams says the same.

Commencing on page 204, the same evidence of tradition with regard to the Tellico dispute is gone into, and the old people fixed that upon the State Ridge.

John Dockery heard old Billy Graves and old Bill Allen speak of the State Ridge as the line, and that the State Ridge had that name from the time he was a boy. He was then seventy-four years of age. Both Graves and Allen said they were along with the Commissioners and he never heard the line disputed until Fain got into litigation about it.

E. R. Hunsucker (Record, 219) had known the State Ridge by that name fifty or sixty years. Knew William Graves well, who told him that he was with the Commissioners; that they crossed Tellico and that State Ridge was the line.

Isaac Lovingood (Record, 221) says substantially the same thing.

D. W. DeWeese knew Graves very well, who said he was with the Commissioners and he pointed out the line to this witness on the State Ridge. That he had known the State Ridge by that name for sixty years.

Many of these witnesses speak of the payment of taxes to the State of North Carolina, service of writs issued by the courts of North Carolina in the disputed territory, and the fact that the children went to school in North Carolina, and especially down on the Slick Rock disputed grounds, the fact that many Tennesseans evaded the justice of Tennessee by running across Slick Rock Creek and locating.

Commencing on page 863 and continuing to page 886, will be found the testimony of Dare Orr, Samuel Sneed, J. S. Maroney, Samuel Henry, J. W. Patten, James McDaniel, John Dockery, N. L. Brittain, James Whitaker, W. P. Jones, W. P. Phillips, Stephen Whitaker, C. C. Jones and R. B. Mashburn, all to the same effect.

Commencing on page 1352, there are more who have testified for the defendant; also on 937, 964, and from 981 to 991 and on 1027 to 1029 and 1077. But we believe that it is quite evident that these witnesses have confused the later tradition, which is mentioned in the decision of the Circuit Court of

Appeals in the case of *Hebard v. Belding*, where they say that after 1882 the tradition became divided. There are none of the defendant's witnesses who speak of having heard of the location of the State line from any persons who were present when it was located. For these reasons we do not hesitate to claim for the evidence of that character for the complainant much more weight than the testimony of the defendant's witnesses is entitled to, and feel that the evidence of tradition is strongly corroborative of all the other evidence in the case for the complainant.

In connection with the above, the vast number of grants and entries in the State of North Carolina, mentioning the Slick Rock Creek as the State line, and other grants around the waters of the Tellico River, which entries and grants extend from pages 89 to 154 of the printed record, and the fact that no Tennessee grants or entries were ever made until 1882 that extended to the eastward of Slick Rock Creek, form a part of the traditionary evidence.

Respectfully submitted,

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